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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No ~~1400~~ 169

BENJAMIN F. KITCHEN, JR.,
Petitioner,

v.

ELIZABETH FRANZHEIM REESE.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No._____

SUCCESSION OF LILLIE WEIR SIMMS,
Widow of Edward F. Simms

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Dr. Benjamin F. Kitchen, Jr., Tutor of the minor, Benjamin F. Kitchen, III, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana entered in the above entitled case on November 7, 1966.

OPINIONS BELOW

The original opinion of the Supreme Court of Louisiana has not yet been reported, and is printed in Appendix B hereto, *infra*, pp. 34-44. The opinion of the Supreme Court

of Louisiana on rehearing has not been reported, and is printed in Appendix C hereto, *infra*, pp. 45-88; the opinion of the Louisiana Court of Appeal, Fourth Circuit, is reported in 175 So.2d 113, and is printed in Appendix D hereto, *infra*, pp. 89-117; the opinion of the Twenty-ninth Judicial District Court for the Parish of Plaquemines is unreported and is printed in Appendix E hereto, *infra*, pp. 118-151.

JURISDICTION

1. The judgment of the Supreme Court of Louisiana was entered on November 7, 1966 (*infra*, Appendix B, pp. 34-44). It became final following denial of petitioner's timely application for rehearing on February 20, 1967. A motion to stay the mandate was denied on March 10, 1967.

2. Petitioner was not a party to these proceedings in the District Court; a motion to be substituted as appellant in the Court of Appeal, Fourth Circuit, was filed on March 13, 1964 (R. 188); the federal question was raised in the Louisiana Court of Appeal, Fourth Circuit, petitioner's brief (R. 451); and in the Supreme Court of Louisiana, (*infra*, Appendix C, pp. 57; 77); petitioner's Federal claim was thus made at the earliest opportunity below and was renewed in the Supreme Court of Louisiana.

3. The jurisdiction of this Court is invoked under the provisions of 28 U. S. Code § 1257 (3).

QUESTIONS PRESENTED

1. Can a Louisiana Court interpret the terms of a Texas will in accordance with definitions of such terms current in Louisiana, and thereby nullify portions of the will when construction of such terms in accordance with the law of Texas would give rise to a valid bequest under the law of Louisiana?

2. Does such an interpretation by a Louisiana Court deprive petitioner's son, as beneficiary under the will, of the constitutional guarantees of equal protection of the law, and of his vested rights in the estate of the testatrix without due process of law as well as the privileges and immunities granted to citizens of the United States, as expressed in the Constitution of the United States, Amendment Fourteen, Section 1?

STATUTES INVOLVED

United States Constitution, Amendment 14, Section 1.

STATEMENT OF THE CASE

Mrs. Elizabeth Franzheim Reese instituted suit to annul the probate of her grandmother's will and to have certain provisions contained in her grandmother's will declared absolutely null and without effect.

Lillie Weir Simms, widow of Edward F. Simms, Mrs. Reese's grandmother, died in Houston, Harris County, Texas, where she was domiciled, on May 1, 1957, leaving a last will and testament dated January 3, 1957, which was admitted

to probate by the Probate Court of Harris County, Texas. By ancillary proceedings conducted in the 25th Judicial District Court, for the Parish of Plaquemines, Number 4270, "Succession of Lillie Weir Simms, widow of Edward F. Simms," in which Mrs. Bessie Franzheim, Kenneth Franzheim, II, W. P. Hamblen, Alden X. Boddeker and Henry C. Riquelmy appeared as petitioners, the last will and testament of Mrs. Simms was by order dated June 5, 1957, registered, probated and ordered executed insofar as the provisions thereof concerned property situated in the State of Louisiana. On July 21, 1958, a judgment of possession was rendered in these ancillary proceedings, placing the legatees under Mrs. Simms' will in possession of her Louisiana estate.

Mrs. Reese's mother, Bessie Simms Franzheim, widow of Kenneth Franzheim, the sole and only child and forced heir of Lillie Weir Simms, died at her domicile in Houston, Harris County, Texas, on December 15, 1959, leaving as her sole and only children and forced heirs, Elizabeth Franzheim Reese, Lillie Franzheim McCullar, divorced wife of Myrlin McCullar, and Kenneth Franzheim, II.

Under the terms of her mother's will, Mrs. Reese was bequeathed nothing; she then instituted proceedings attacking the will, in which judgment was rendered rejecting her demands, *Reese v. Franzheim*, 381 S.W.2d 329, writ of error refused (1964).

More than three years subsequent to the rendition of the judgment of possession in "Succession of Lillie Weir Simms," Mrs. Reese filed suit on November 27, 1961, alleging the invalidity of Article XIX of Mrs. Simms' last will and testament, the invalidity of the order admitting the last

will and testament of Mrs. Simms to probate, insofar as it concerns the provisions of Article XIX thereof, and the invalidity of the judgment of possession insofar as the same concerns the provisions of Article XIX of the purported Simms will. It was alleged that the attempted disposition set forth in Article XIX contained prohibited substitutions in violation of Section 16, of the Fourth Article of the Constitution of 1921, Article 1520 of the Revised Civil Code and Article 9:1791 of the Revised Statutes; that the testamentary dispositions contained in Article XIX of Mrs. Simms' will were attempted to be made by reference to extrinsic, non-testamentary inter vivos trust agreements; that the dispositions set forth in Article XIX are in violation of Article 1573 of the Louisiana Civil Code which prohibits all testamentary dispositions which are committed to the choice of a third person.

Article XIX of the Simms will reads as follows:

"All the rest, residue and remainder of my estate, real, personal and mixed, of whatever kind and character and whatsoever situated, I give, devise and bequeath as follows:

"(A) One-half (½) thereof in trust to Bessie Franzheim, Kenneth Franzheim, II, Alden X. Boddeker, Henry C. Riquelmy and W. P. Hamblin, and their successors, the Trustees named in the LILLIE WEIR SIMMS TRUST FOR LILLIE FRANZHEIM McCULLAR, which Trust Agreement is recorded under file #69835 in Book 103 of Conv., Page —, and Book 1 of Dan., Page —, et seq., in the Parish of Cameron, State of Louisiana, to be held and administered by them and the income from which shall be invested or distributed at the sole discretion of said Trustees, and shall be held by said Trustees and

their successors with the same rights, powers and duties as are set forth in the above named Trust Agreement, save only that income from the properties herein bequeathed to them as such Trustees may either be invested by them or distributed to the beneficiary, at their sole discretion, and said beneficiary shall not have the right to demand any distribution to her should the Trustees, in their sole and unlimited discretion, decide that such distribution is either unnecessary or otherwise. Said properties herein bequeathed to said Trustees shall be held for them for and during the natural life of my said granddaughter, LILLIE FRANZHEIM McCULLAR, if she survives me, and after her death or my death, whichever occurs last, said properties shall pass to my great-grandchildren, LILLIE CELESTE McASHAN, KENNETH ALEXANDER McASHAN, ELIZABETH McASHAN and MICHAEL M. McCULLAR, share and share alike, subject to the provisions of Paragraph (C) hereof.

"(B) The other one-half (½) thereof in trust to Kenneth Franzheim, Bessie Franzheim, Alden X. Boddeker, Henry C. Riquelmy and W. P. Hamblen, and their successors, the Trustees named in the LILLIE WEIR SIMMS TRUST FOR KENNETH FRANZHEIM, II, which trust agreement is recorded under file #69830 in Book 103 of Conv., Page —, and Book 1 of Don., Page —, et seq., in the Parish of Cameron, State of Louisiana, to be held and administered by them and the income from which shall be invested or distributed at the sole discretion of said Trustees, and shall be held by said Trustees and their successors with the same rights, powers and duties as are set forth in the above named Trust Agreement, save only that the income from the properties herein bequeathed to them as such Trustees may either be invested by them or distributed to the beneficiary, at their sole discretion, and said beneficiary shall not have

the right to demand any distribution to him should the Trustees, in their sole and unlimited discretion, decide that such distribution is either unnecessary or unwise. Said properties herein bequeathed to said Trustees shall be held by them for and during the natural life of my said grandson, KENNETH FRANZHEIM, II, if he survives me, and after his death, or my death, whichever occurs last, said properties shall pass to my great-grandchildren, LILLIE CELESTE McASHAN, KENNETH ALEXANDER McASHAN, ELIZABETH SIMS McASHAN, MICHAEL M. McCULLAR, BENJAMIN FORD KITCHEN, III, EDWARD SIMS KITCHEN, and ELIZABETH FRANCES KITCHEN, share and share alike, subject to the provisions of Paragraph (C) hereof.

"(C) In the event that at the time of the vesting of such properties in my said great-grandchildren, any of my said great-grandchildren named herein should be under the age of twenty-one (21) years, then and in that event the properties herein bequeathed to such minor shall pass to and become the properties of the Trustees of such great-grandchildren under the trusts which I have heretofore created and which I now create as follows:

"(1) LILLIE WEIR SIMMS TRUST FOR LILLIE CELESTE McASHAN bearing file number 69836 and recorded in Book 103 of the Conveyance and Donation Book 1, Cameron Parish, Louisiana;

"(2) LILLIE WEIR SIMMS TRUST FOR KENNETH ALEXANDER McASHAN bearing file number 69837 and recorded in Book 103 of Conveyance and Donation Book 1, Cameron Parish, Louisiana;

"(3) LILLIE WEIR SIMMS TRUST FOR ELIZABETH SIMMS McASHAN bearing file number 69838

and recorded in Book 103 of Conveyance and Donation Book 1, Cameron Parish, Louisiana;

"(4) LILLIE WEIR SIMMS TRUST FOR BENJAMIN FORD KITCHEN, III, bearing file number 69834 and recorded in Book 103 of Conveyance and Donation Book 1, Cameron Parish, Louisiana;

"(5) LILLIE WEIR SIMMS TRUST FOR EDWARD SIMMS KITCHEN bearing file number 60833 and recorded in Book 103 of Conveyance and Donation Book 1, Cameron Parish, Louisiana;

"(6) LILLIE WEIR SIMMS TRUST FOR ELIZABETH FRANCES KITCHEN bearing file number 69832 and recorded in Book 103 of Conveyance and Donation Book 1, Cameron Parish, Louisiana;

"(7) as to MICHAEL M. McCULLAR, who has no trust provided for him as set out above, if at the time of the vesting of such properties in him he be under the age of twenty-one (21) years, then the share bequeathed to him shall pass to and become the properties of these Trustees: W. P. Hamblen, Alden X. Boddeker, Henry C. Riquelmy and Bessie Franzheim. Such trust shall be created for the same length of time as is provided in the trusts set out in the paragraphs numbered (1) through (6) above, so that the Trustees in this trust, if created, shall hold said properties in trust for such minor child in the same manner as is provided in the trusts above named. Said Trustees shall execute an instrument in writing recordable in the Parishes in Louisiana in which my property may be situated acknowledging that they hold said property in trust, and such instrument shall set out the terms and conditions of said trust as are set forth in these six (6) trusts above referred to.

"(The trust agreements set out in Paragraphs (1) through (6) above are recorded in other parishes in Louisiana, but these references are given for the purpose of identifying the Trustees and the trust properties which shall pass in the event any of my properties shall go to any of the above named great-grandchildren under said trusts.)

"Such portions of my estate going to the Trustees of any of my said great-grandchildren under this, my Will, shall be held, managed and administered by said Trustees in the same manner, to the same extent, and with the same duties as are conferred in the Trust Agreement set out in Paragraphs (1) through (6) above, and shall be held by such Trustees for the same term as is set forth in such Trust Agreements, whereupon said properties herein bequeathed and the accumulations shall be paid over to my great-grandchildren."

Named as defendants were Kenneth Franzheim, II, individually, who is one of the three children of Mrs. Franzheim and a beneficiary under one of the trusts attacked, as an executor of the estate of Mrs. Simms and as a trustee of one of the trusts attacked; Mrs. Lillie Franzheim McCullar, individually, as a child of Mrs. Franzheim and beneficiary of one of the trusts under attack, as Provisional Administratrix appointed in proceedings before this Court in the Succession of Mrs. Franzheim, and as tutrix of her minor children, Lillie Celeste McAshan, Kenneth Alexander McAshan, Elizabeth McAshan, and Michael M. McCullar, who are beneficiaries under the trusts attacked; Alden X. Boddeker; Henry C. Riquelmy; and W. P. Hamblen, in their capacities as executors and trustees; the minor children of the plaintiff, Benjamin Ford Kitchen, III, Edward Simms Kitchen and Elizabeth Frances Kitchen, as beneficiaries under one of the trusts

attacked. All of the defendants except Mrs. McCullar are non-residents of the State of Louisiana.

Declinatory exceptions were filed on behalf of all the other defendants except Mrs. Reese's minor children, urging that the Court lacked jurisdiction over the subject matter as well as the person of each non-resident, and that the Succession of Mrs. Simms was closed upon the rendition of the judgment of possession; that the Court lacked venue of the action with respect to all properties located outside of Plaquemines Parish. These exceptions were overruled, and following a trial on the merits, a judgment was rendered in favor of Mrs. Reese and against the defendants, cancelling, annulling and rescinding and setting aside all proceedings in the Succession of Lillie Weir Simms, widow of Edward F. Simms, Number 4270 of the Docket of the Twenty-fifth Judicial District Court, relating to and based upon portions of the said last will of January 3, 1957, declared to be absolutely null and void and without effect, specifically Article XIX thereof. The Court also found that the decedent died intestate as to the two-thirds of her property which she attempted to dispose of in Article XIX, which was included in the trusts purportedly established in the said judgment of possession of July 21, 1958, and that this property was inherited by Mrs. Bessie Simms Franzheim, the sole and only child and forced heir of the decedent.

Since Elizabeth Franzheim Reese, Lillie Weir Franzheim McCullar and Kenneth Franzheim, II, are the sole children and forced heirs of Mrs. Bessie Simms Franzheim, the district court held that they were entitled to be placed in possession of the entirety of the immovable property of the decedent described in the judgment of possession of July 21, 1958, two-

thirds of which was inherited by Bessie Simms Franzheim, and one-third was bequeathed to her by the decedent. No determination of the portion of each of the said three children was made pending final determination of the proceedings in the Franzheim Succession; nevertheless, the Court held that as the sole, forced heirs of Bessie Simms Franzheim, they should each receive not less than two-ninths (2/9) of the said property inherited by their mother, who was the sole child and forced heir of Lillie Weir Simms, and such property as was bequeathed to her as the legatee under that portion of the will of Lillie Weir Simms dated January 3, 1957, which was not declared null, void and without effect by the lower court's judgment.

A curator ad hoc had been appointed to represent Mrs. Reese's minor children, Benjamin F. Kitchen, III, Edward K. Kitchen and Elizabeth F. Kitchen, all minors and non-residents of the State of Louisiana, who petitioned for appeal. Subsequently, a motion for leave to substitute Dr. Benjamin F. Kitchen, Jr. as tutor of the minor, Benjamin F. Kitchen, III, was signed (R. 151).

On appeal, the Court of Appeal for the Fourth Circuit affirmed the decision below, based on the similar determination that the will's testamentary trusts contained invalid substitutions. Petitioner and three other parties made timely application for rehearing, all of which were denied on March 8, 1965, without written reasons.

Applications for writs of certiorari or review filed by the executors and trustees under the Simms will; the Kitchen minors; Mrs. McCullar's minor children; and petitioner were granted by the Supreme Court of Louisiana (R. 654). Mrs. Simms' testamentary executors then filed an exception

of no right of action, averring that Mrs. Reese had no interest in the matter inasmuch as she was a stranger to the estate of her grandmother, by virtue of her not being an heir of Mrs. Simms, and that she acquired no seizin in the succession of her mother, Mrs. Bessie Franzheim. In its original opinion, the Supreme Court maintained this exception, reversed and set aside the judgment of the Court of Appeal, Fourth Circuit, and dismissed plaintiff's suit; Chief Justice Fournet dissented, being of the opinion the appellate court's decision was well considered and properly resolved all issues.

A rehearing was granted on January 17, 1966, and on November 7, 1966, the majority of the Court held that the exception of no right of action must be overruled since Mrs. Reese became seized of all the rights of her mother at the moment of her mother's death. Accordingly, Mrs. Reese was able to institute an action to establish that Article XIX of the Simms will contained a prohibited substitution, and was absolutely null.

On the merits, the majority found that Mrs. Simms bequeathed the remainder of her Louisiana properties to the trustees of her grandchildren, Mrs. McCullar and Mr. Franzheim, to hold until the latters' death, at which time the properties were to vest in great-grandchildren, which was a prohibited substitution under Article 1520 of the Louisiana Revised Civil Code, and absolutely null.

Further, the majority held that the contention that the rights of petitioner's son to equal protection guaranteed by the United States Constitution, Amendment Fourteen, was without merit (*infra*, Appendix C, p. 77).

In their dissenting opinions, Justice Hamlin and Justice Sanders declared that the will did not contain a double dis-

position of the full ownership of the property as would be prohibited under Article 1520 of the Louisiana Revised Civil Code, and that there were no substituted beneficiaries; therefore, the will should be upheld as valid under the law of Louisiana.

REASONS FOR GRANTING THE WRIT

I. THE WILL'S TERMS AS CONSTRUED IN ACCORDANCE WITH COMMON LAW TERMINOLOGY CREATED A VALID BEQUEST UNDER LOUISIANA LAW

Under the terms of the testatrix' will, her daughter, Bessie Simms Franzheim, was to receive one-third of her Louisiana property, and the residue was disposed of by means of two trusts, the "Lillie Weir Simms Trust for Lillie Franzheim McCullar," and the "Lillie Weir Simms Trust for Kenneth Franzheim, II," in which these two grandchildren were to receive income from the trusts, if the trustees, in their discretion, distributed it to them, and at the death of these grandchildren, ". . . said properties shall pass to my great-grandchildren . . . ."[1] The Supreme Court of Louisiana found that the language of the will could only be construed as importing a prohibited substitution.[2]

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1. The great-grandchildren's interest in the principal was made subject to Paragraph C, which made provision for the properties going into other trusts only if they were minors at the time of the death of the grandchildren.

2. "In other words, title to the property did not vest in the principal legatees until the trust terminated, at which time there was a second transfer—second vesting—of title, referred to by one writer as the 'hallmark of the prohibited substitution.' Since there was no vesting of the property in the principal legatee at the testator's death, only *in futuro*, the fact that it was stipulated in the will the property was bequeathed to the trustee 'in trust' contained no magic formula to cure this obvious substitution." (Appendix C, p. 73) Article 1520 of the Louisiana Revised Civil Code provides: "Substitutions and *fidei commissa* are and remain prohibited. Every disposition by which the donee, the heir, or legatee is charged to preserve for or to return a thing to a third person is null, even with regard to the donee, the instituted heir or the legatee."

In the courts below, petitioner argued that this portion of the will should be upheld inasmuch as it could be construed as creating a trust for income beneficiaries, the grandchildren, and principal beneficiaries, the great-grandchildren, who were in being and ascertainable at the time of the creation of the trusts: both trusts were to terminate upon the death of the income beneficiary, which is permitted under the Louisiana Trust Estates Act of 1938, as amended in 1952 (La. Revised Statutes, Title 9:1721-2252).[3]

Such an interpretation would have been consonant with previous holdings of the Supreme Court of Louisiana in *Succession of Thilborger*, 234 La. 810, 101 So.2d 678 (1958), in which the testatrix' husband was bequeathed the use of certain property, which, at his death was to be given to Charity Hospital; as well as *Succession of Fertel*, 208 La. 614, 23 So.2d 234 (1945), wherein a husband's usufruct and his son's legitime were recognized under the terms of a will which left the property to the husband, and after his death to the son.

A. The Supreme Court of Louisiana Erred in Failing to Consider the Law of Texas in Construing the Terms of the Will and Determining the Intention of the Testatrix.

Petitioner submits that in interpreting the language of Mrs. Simms' will, the Supreme Court of Louisiana failed to

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3. In contrast to common law concepts, Louisiana did not recognize the co-existence of legal and beneficial title, and therefore, trusts were invalid until special legislation provided for limited types of trust arrangements was passed in 1938, amended in 1952, and in 1964, legislation providing for more liberal trusts was passed (La. Revised Statutes, Title 9:1721-2252). Under the 1938 Act, as amended in 1952, a trust could be created for the duration of the life of the beneficiary, La. Revised Statutes, Title 9:1794. Under civilian theory, ownership could only be split into usufruct (life estate), and naked ownership (fee interest).

take into account the legal significance of the language used which created a vested remainder in the great-grandchildren, and did not provide for a second vesting in them subsequent to the death of the grandchildren.

The guiding principle in construction of provisions of a will is expressed in Article 1712 of the Louisiana Revised Civil Code which directs that the intention of the testator must be ascertained without departing from the proper signification of the terms of the testament, see *Succession of Mulqueeny*, 248 La. 659, 181 So.2d 384 (1965); *Succession of McCarron*, 247 La. 419, 172 So.2d 63 (1965); *Succession of Davis*, 178 So.2d 481 (La. App. 1965).

In line with these authorities, the Supreme Court of Louisiana has gone to great lengths in determining the testator's intention in past decisions. For example, in *Succession of Price*, 202 La. 842, 13 So.2d 240 (1943), a will contained a provision that after all bequests are carried out and all indebtedness paid, the testatrix wished the balance of her estate to be divided equally among her nieces, nephews, great nieces and nephews, great-great nieces and nephews. It was clear that unless the estate expenses were paid before satisfaction of the mentioned bequests of one-half and one-fourth of the estate respectively, the residuary legatees would receive nothing. In interpreting the will, the court discussed evidence showing that the decedent was an educated, intelligent person, accustomed to having a great deal of money and managing her estate, and observed:

> "To determine the intention of the testator the whole will is to be taken into consideration. Every word must be given effect if that can be done without defeating the

general purpose of the will which is to be made effective in every reasonable method." * * * (Omitting citations)

Succession of Price, 13 So.2d at p. 244.

In this fashion, the court placed itself in the shoes of the testator, and attempted to view the provisions from the standpoint of the writer of the will, having due regard for her personal attributes. In the instant case, the Louisiana court should have placed itself in the position of the testatrix, a Texas domiciliary, who relied on her Texas attorney.

There can be no way to arrive at the proper import of terms used by Mrs. Simms, or her intention, unless these terms are analyzed in accordance with the laws of Texas; where she was domiciled at the time of her death. The rule has been enunciated in the following excerpt from 16 Am. Jur. 2d, Conflict of Laws, Sec. 68, at p. 106:

"On the other hand, **when the sole question is the ascertainment of the testator's intention from the language used in the will, or the sense in which certain words or phrases are used, and not their legal effect, they will be construed according to the lex domicilii in the case of real as well as personal property.** In such cases, although there is some authority to the contrary, the rule directly or inferentially supported is that in the absence of language or circumstances indicating that the testator had in mind the meaning and scope attributed to the language used in the will by the law of a state other than that of his domicile, he must be presumed to have had in mind, not the law of the situs of the property, but the law of his domicile, and must have used such language in the sense which the law ascribes to it, since that is the law with which he may be presumed to be

> the most familiar. Hence, **the governing law as to the interpretation of the will—that is, to determine the meaning of the language used, and through it the intention of the testator—is the law of his domicile, unless other language or circumstances indicate the contrary.**" (Emphasis supplied)

Cases applying the law of the testator's domicile as opposed to that of the situs of the property, are collected in Annot., "Conflict of Laws as to the Effect and Construction of Will Devising Real Property," 79 A.L.R. 91 (1932); see also "Stare Decisis and Rules of Construction in Wills and Trusts," 52 Cal. L. Rev. 921 (1964); "The Art of Interpretation of Wills," 17 Vand. L. Rev. 1407, 1412 (1964).

It should be emphasized that petitioner is urging that the law of Texas be considered for one purpose alone—that of determining the intention of the testatrix, which the Court is bound to do under Louisiana Revised Civil Code Article 1712. In order to do this, the Court must consider the meaning of terms used by a person familiar with the law of Texas, being counseled by a member of the Texas bar. The fact that such terms are unfamiliar to the Louisiana legal vocabulary does not lead inescapably to a conclusion that the provisions are invalid. On the contrary, as is discussed below, a correct analysis of the will's terms establishes beyond doubt that the will created interests permitted by Louisiana and did not contain a prohibited substitution.

Certainly it would be unwarranted to conclude that it was Mrs. Simms' intention to use terms in the same sense as a Louisiana resident advised by a Louisiana attorney. Nevertheless, the Supreme Court of Louisiana, in its opinion on rehearing, assumed that this was the case, and did not take

into account the significance attached to terms in the will under Texas law. This unfounded assumption frustrated the intention of the testatrix, and culminated in the erroneous finding that the testatrix intended to create a prohibited substitution, which finding petitioner submits should be reversed.

B. By the Terms of Her Will, the Testatrix Intended that the Interest of Her Great-Grandchildren Vest at the Time of Her Death, Not at an Uncertain Future Date.

The Supreme Court of Louisiana, in discussing the terms of the will, observed that Mrs. Simms could have made a valid disposition if she had ". . . left the property at death to one intended as the principal legatee, subject to conditions of the Trust for the beneficiary under the administration of the Trustee." (Appendix C, p. 73).

It is petitioner's contention that this is exactly what the terms of Mrs. Simms' will signify, and to hold otherwise is contrary to the intention of the testatrix. She meant to leave her property to her great-grandchildren, subject to the conditions of the trust; one of these conditions was the payment of income to the grandchildren at the discretion of the trustees.

Article XIX of the will provided that the residue of the estate was to be held in trust by certain named trustees for the natural life of her granddaughter or grandson, and after their death, ". . . . said properties shall pass to my great-grandchildren . . ." Such language as construed by common law authorities, does **not** imply futurity of transfer, or any sort of contingent interest, or that the interest of the great-grandchildren did not spring into being until the death of

the grandchildren, as may be seen by the following portion of a leading treatise on this subject, American Law of Property, Volume 5, Section 21.9, at page 140:

> "It is not uncommon for a disposition to contain words, which taken literally appear to impose a condition upon a created interest in property, but upon analysis are found not to have such an effect. As the court said in Dowd v. Scally, 174 N.W. 938, 940 (Iowa 1919):
>
> > 'While for example a devise in so many words, "To A, with remainder over to B" and no more, is all that is necessary to create a life estate and vested remainder, yet it is the inveterate tendency * * * to first state the devise of the life estate, following which is a devise of the same property to the remainderman 'on the death,' or 'at the death,' or 'after the death' of the life tenant, or other words of similar import. **To say that such an expression has the effect of suspending the vesting of the remainder until the death of the life tenant is to revolutionize the accepted canons of construction.**'
>
> "In this situation the words 'on the death,' or 'at the death,' or 'after the death' of the life tenant merely refer to the termination of the preceding interest in the normal manner, and do not indicate that the remainderman is required to survive the life tenant, or that the remainderman is required to wait until the life tenant in fact dies, if the life estate ends before his death, in order to be entitled to possession of the property. It is characteristic of remainders that they wait for the termination of the preceding estate, and consequently, the fact that such characteristic is stated in language which describes normal ending of the prior estate is no basis for regarding the remainder as being subject to a condition." (Emphasis supplied)

The fact that language implying transfer at a future time actually conveys an interest at the time of the testatrix' death is borne out by the following section from the Restatement of the Law of Property:

> **"Remainders Indefeasibly Vested—Limitation 'on,' 'upon,' 'at,' or 'after' death, or 'when' one dies.** Such a limitation as is described in Comment **h** is not precluded from creating indefeasibly vested remainder by the fact that the remainder is in specific words, limited to the properly identifiable person 'on,' 'upon,' 'at' or 'after' the death of a person having a prior interest for life, or 'when' such a person dies. **Language of this type indicates the postponement of enjoyment implicit in all indefeasibly vested remainders and injects no element of certainty."** (Emphasis supplied)
>
> Restatement of Law of Property, Sec. 157, Comment j, at p. 549.

The Restatement of the Law of Property gives three illustrative examples which are pertinent to this problem, which appear following Comment h, page 548, as follows:

> Illustration No. 6:
>
> "A owning Blackacre in fee simple absolute transfers Blackacre 'to B for 20 years or until 3 dies, whichever period shall first end, and thereafter to C and his heirs.' C has an indefeasibly vested remainder in Blackacre."
>
> Illustration No. 8, Page 549:
>
> "A having complete property in 1,000 shares in United States Steel Co. transfers these shares 'to B as Trustee to hold and manage and to pay over the net income

derived therefrom' to a designated non-charitable corporation 'for 30 years or the lives of the six named persons, whichever period shall first end, remainder to C, his executors, administrators and assigns.' C has an indefeasibly vested remainder in the 1,000 shares."

Illustration No. 9, Page 549:

"A owning Blackacre in fee simple absolute effectively devises Blackacre to B as Trustee for the benefit of his (A's) wife C for life or so long as she shall not remarry, remainder to D and his heirs. D has an indefeasibly vested remainder in Blackacre."[4]

The above stated general principles and specific illustrations are fortified by a late case and a comment appearing in the 1962 pocket part of Volume 5, American Law of Property, Section 21.18, as follows:

"The particular structure of the Will appears to have some effect on the construction, for example, see *in re Davis' Estate*, 17 Misc. (2d) 2, 183 NYS (2d) 963 (Surr. Ct., 1959), where the Testatrix in the fifth clause of her Will devised a ⅔ interest in the residue to A. In the sixth clause she provided that if A was a minor at the time of distribution, the Executrix was to hold his share with discretion to pay the whole or a part of the income to A or accumulate it, together with the corpus, to A, 'upon attaining the age of 21 years * * *.' The court held that A had an absolute interest."

Specifically, the depositive instrument here under consideration, the Last Will of Mrs. Simms, provides that the

4. It should be emphasized that although these fundamental principles are very familiar to lawyers schooled in common law, Louisiana lawyers trained in civil law have little contact with such tenets either in law school or in their practice.

residue of her property is vested in her great-grandchildren, but subject, however, to the rights of her grandchildren, Lillie Franzheim McCullar and Kenneth Franzheim, II, to receive portions of the income during their lifetimes, the remainder—and that is the vested remainder—being at all times from the date of the death of Mrs. Simms, the property of the great-grandchildren owned by them to the fullest extent of ownership recognized in law with only the rights of enjoyment postponed to some future date.

This is particularly clear because of the fact that nowhere in the Will do either of the life tenants, the grandchildren, acting through Trustees or otherwise, have any right to sell, mortgage or commit waste of the principal properties from which the income was expected to be derived, the Testatrix having made specific provisions that "the income from which (the Trust property) shall be invested or distributed at the sole discretion of the said Trustees * * * " and "only that the income from the properties herein bequeathed to them as such Trustees may either be invested by them or distributed to the beneficiary, at their sole discretion, and such beneficiary shall not have the right to demand any distribution * * *." The life estates thus created give the life tenants a "limited" life estate (since the income may not be distributed to them) and are specifically included in the will for the protection of the vested remaindermen (or their distributees) who clearly must some day have the right of enjoyment.

The same type of language indicating postponement of enjoyment was found to give an interest at the death of the testator in the Louisiana decision *Leonora v. Scott*, 10 La. Ann. 651 (1851), in which the will provided:

"Thirdly, I hereby give to the said Leonora an annuity of one hundred and fifty dollars a year during her natural life, as a charge upon my whole estate. Fourthly, I give and bequeath unto my natural son, Joseph Douglas, three thousand dollars, and unto my natural son, Charles Dudley, two thousand dollars to be paid to them respectively on their attaining the age of twenty-one years."

The first child, Joseph Douglas, died before reaching majority and the plaintiff, Leonora, the tutrix of the survivor, Charles Dudley, claimed she was entitled to the legacy as the heir of her son. The Court held that Joseph Douglas actually had a present right at the time of the death of the testator:

"To hold that the bequest to Joseph Douglas was conditioned upon his reaching the age of majority, would require us to depart from the proper signification of the terms used by Douglas Wilkins. The gift is absolute, the term of payment is fixed at the period of the legatee's majority; purum legatum est, quia non conditione, sed mora suspenditur. Dig. De Cond. et Demon, L. 79. The articles 1691, 1692 of the Louisiana Code are identically the articles 1040, 1041 of the Napoleon Code. In commenting upon the latter articles, Toullier says:

" 'Je donne a Paul 3000f., qui lui seront comptes le jour de sa majorite. Il n'y a la qu'un terme et non une condition. Si Paul meurt avant avoir atteint sa majorite, le legs est transmis a ses heritiers,' etc. Toullier, vol. 5, No. 674."[5]

Leonora v. Scott, supra, at p. 652.

The rule of the *Scott* case is formulated in 96 C.J.S. Wills, Sec. 922 at p. 376:

5. "I give to Paul 3,000 francs, which shall be payable to him when he reaches majority. There is only a term and not a condition. If Paul dies before reaching his majority, the legacy is transmited to his heirs," etc.

"Where the will contains words of postponement or futurity, the time of vesting depends on whether the postponement or futurity was intended to relate merely to the payment, or delivery of the gift or to the substance thereof.

"A testamentary gift may be vested in interest although the possession or actual enjoyment is postponed to a future time; and the fact that it is uncertain whether or not the beneficiary will ever actually enjoy or possess his estate does not render it contingent, since it is uncertainty as to the right of that enjoyment which differentiates a contingent from a vested interest."

To the same effect is 33 Am. Jr., Life Estates, Remainders, Etc., Sec. 67 at pp. 527-528; Sec. 86, at p. 543; Sec. 96 at p. 553.

The majority opinion of the Louisiana Supreme Court (Appendix C) indicates that perhaps some terminology in Paragraph (C) of the will was used as the basis for the Court's decision, which reads in part, "In the event that at the time of the vesting of such properties in my said great-grandchildren, any of my said great-grandchildren named herein should be under the age of twenty-one (21) years . . ."

Presumably, the court felt that these words were indicative of a vesting of interest in the great grandchildren at some date beyond death of Mrs. Simms, since the court concluded that ". . . title to the property did not vest in the principal legatees until the trusts terminated, at which time there was a second transfer—a second vesting—of title, referred to by one writer as the 'hallmark of the prohibited substitutions.' " (Appendix C, p. 73).

Petitioner submits that no second vesting was contem-

plated, and that the explanation is simply that the Paragraph obviously was inserted to make provision for the care, management and control of the properties in the event the great grandchildren should be under the age of 21 years at the time of obtaining present enjoyment, and Clause C, if effective, would operate only to avoid the necessity of Court appointment of legal representatives of minors. Paragraph (C) does not dispose of property, and therefore does not and cannot impose a restriction upon the vesting of the interests, and has no bearing upon the nature of the interest received by the great grandchildren, and therefore has no bearing upon the remainder interest received by the great-grandchildren in Paragraphs (A) and (B).

The estate received by the great-grandchildren is that which was transmitted to them under Paragraph (A) and (B): "and after her death * * * said properties shall pass to my great-grandchildren." Those depositive words, under the universally recognized rule as to vesting of remainders, give a present vested interest, and to say otherwise would be "to **revolutionize** the accepted canons of construction" (American Law of Property, Vol. 5, Sec. 21.9, at p. 140; Emphasis supplied.)

Moreover, the court's construction of this clause does not take into account the proper signification of the term "vesting," which is not equivalent to passing of title or interest. The true import of vesting as used by Mrs. Simms is the vesting of the right of enjoyment which was necessarily postponed, but would not derogate from the great-grandchildren's having an interest as of the time of the testatrix' death. The usage of the term vested as meaning vested in possession is explained in 57 Am. Jur. Wills, Sec. 1230:

> "The fact that the testator has declared that a legacy shall be 'vested' at a certain period, while some indication of intention, is not necessarily conclusive, inasmuch as the word 'vested' is capable of three meanings: (1) as meaning vested in interest—its primary and ordinary meaning; (2) as vested in possession or enjoyment—where it is, when used in connection with legacies, equivalent to 'payable'; and (3) as 'not subject to be divested,' or 'indefeasible.' "

Further elaboration on this point is found in 31 C. J. S., Estates, Sec. 5, at p. 18:

> "Vested estates are sub-divided into estates vested in possession and estates vested in interest. An estate is vested in possession when there is a right of present enjoyment. An estate is vested in interest when there is a present fixed right of future enjoyment; a present and immediate interest, as distinguished from an interest the existence of which depends on a contingency, as where there is a person in being who would have an immediate right to the estate on the ceasing of an intermediate or precedent estate or interest."

Petitioner urges that the only interpretation which carries out Mrs. Simms' intention is that Paragraph (C) had reference only to vesting in possession, and not vesting in interest.

When viewed in the light of the generally accepted standards of construction of common law terms, it is abundantly clear that Mrs. Simms did, in fact, leave the "property at death to the one intended as the principal legatee, subject to the conditions of the Trust for the beneficiary under the administration of the Trustee," which according to the Su-

preme Court of Louisiana would not amount to a prohibited substitution invalidating the will.

II. THE FAILURE OF THE SUPREME COURT OF LOUISIANA TO APPLY TEXAS LAW IN INTERPRETING THE WILL DEPRIVED PETITIONER'S SON OF HIS VESTED RIGHTS WITHOUT DUE PROCESS OF LAW AND ABRIDGED HIS CONSTITUTIONAL RIGHT OF EQUAL PROTECTION OF THE LAW AND THE GUARANTEE OF PRIVILEGES AND IMMUNITIES.

Since petitioner's son, as a great-grandchild of Mrs. Simms, was bequeathed a vested remainder,[6] such property rights are protected by the safeguards of due process and equal protection of the law.[7]

It is petitioner's contention that the Supreme Court of Louisiana abridged these rights by refusing to use the same standard of interpreting Mrs. Simms' will as it had used in interpreting wills drafted by persons in Louisiana. The arbitrary discrimination practiced by the court consisted of failing to look to all the circumstances involving the testator and

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6. *McArthur v. Scott*, 113 U.S. 340 (1885); and *Cropley v. Cooper*, 19 Wall 167, 22 L.Ed. 109 (1873).

7. *Barrows v. Jackson*, 346 U.S. 249 (1953); *United States v. Northern Pac. Ry. Co.*, 256 U.S. 51 (1921). Currie and Schreter, "Unconstitutional Discrimination in the Conflict of Laws," 28 Univ. of Chicago L. Rev. 1 (1960), and Currie and Schreter, "Unconstitutional Discrimination in the Conflict of Laws—Privileges and Immunities, 69 Yale L.J. 1323 (1960); Leflar, "Constitutional Limits on Free Choice of Law," 28 Law and Contemporary Problems 706, at pp. 708-709 (1963). The term "property" as used in the constitutional guarantee includes the vested right of a successor in decedent's property, *Mitchell v. Williamson*, 304 P.2d 314 (S. Ct. Okla.) (1956); and *Parlato v. McCarthy*, 136 Conn. 126, 69 A.2d 648 (1949); 19 Am. Jur., Estates, Sec. 11, p. 469; and 16 C.J.S., Const. Law, Sec. 228, at p. 1198. Denial of equal protection of the law applies to judicial action by a state, *Bell v. State of Maryland*, 378 U.S. 258 (1964); *Shelly v. Kraemer*, 334 U.S. 1 (1948).

the preparation of the will herein, which it has always done when it considered a Louisiana will of a Louisiana domiciliary.[8]

In the instant case, the court made no attempt to discern the intention of the testatrix, and ignored the obvious fact that the will was confected in Texas by Texas lawyers using common law terminology at the instance of a Texas domiciliary.[9] The Louisiana court attempted to read the will's provisions as a civil lawyer would, and thus erroneously concluded that such language as ". . . the properties shall pass . . ." implied futurity, as they would in civil law even though at common law, these words import immediate vesting and future enjoyment, *Doe's Lessee v. Considine*, 6 Wall 458 (1867).

It is submitted that petitioner herein should not be penalized by the Louisiana court's ill founded conclusions relative to common law wills, and that, in any event, the law of the domicile of Mrs. Simms was controlling in ascertaining her intentions.[10] Accord, Appendix B, p. 41.

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8. The Supreme Court of Louisiana has given very careful consideration to many factors relative to the testator in arriving at the testator's intention, e.g. *Oroszy v. Burkard*, 158 So.2d 405 (La. App. 1963); *Succession of Midqueeny, supra*; *Succession of McCarron, supra*, and *Succession of Price, supra*, which conforms to the holdings of this Court, *Kenaday v. Sinott*, 179 U.S. 606 (1900); *Adams v. Cowen*, 177 U.S. 471 (1899); *Lee v. Simpson*, 134 U.S. 572 (1890), and *Smith v. Bell*, 34 U.S. 43 (1832).

9. Another Texas resident's will bequeathing Louisiana land was nullified in *Succession of Guillory*, 232 La. 213, 94 So.2d 38 (1957), as containing a prohibited substitution. This decision was relied on by the court herein, Appendix C, *infra*, at p. 72, also contained language using the future tense regarding property left in trust being transmitted at the death of the testatrix' son to the Baptist General Convention. Because the son had only the right to income from the trust for life, this would not be a double vesting, and was permitted by the law of Louisiana. The observation was made that the ". . . Guillory case may have no implication other than for its limited holding because of the fact that the will was poorly drawn for probate in Louisiana." "Jackson & Jeter, The Guillory Case; What are its Implications for Private and Charitable Trusts?" 32 Tul. L. R. 414, 426 (1958).

10. *Greenwood v. Page*, 78 App. D.C. 166, 138 F.2d 921 (1943); *White v. Keller*, 30 U.S. App. 275, 68 Fed. 796 (1895); *B.M.C. Durfee Trust v. Franzheim*, 349 Mass. 335, 207 N.E.2d 913 (1965); *Keith v. Eaton*, 58 Kan. 732, 51 Pac. 271 (1897). Restatement 2d, Conflicts of Law, Sec. 1010, p. 97, Tent. Draft No. 13 (1965).

In this connection, petitioner argued below that the law of the

This Court has declared that the constitutional right of equal protection envisions uniform treatment of persons as regards legal rights already in existence, *Reynolds v. Sims*, 377 U.S. 533 (1964), which was clearly absent in the case at bar. If a state is not permitted to discriminate in its handling of jury selection, voting registration and the countless other examples of action taken by this Court to end such unjustifiable state activity, then it must follow that state action through its judiciary which applies a different standard to a will of a non-domiciliary as opposed to a domiciliary of Louisiana, must be likewise struck down as equally repugnant.

Moreover, Louisiana courts are bound by the United States Constitution to accord to the citizens of sister states, such as petitioner, the privileges and immunities which it grants its own citizens, *People of the State of New York v. O'Neill*, 359 U.S. 1 (1959); *Hague v. Committee for Industrial Organization*, 307 U. S. 496 (1939). No such privilege was extended herein. On the contrary the Louisiana Court did not heed the well established principle favoring upholding a trust instrument, *Lelong v. Succession of Lelong*, 164 So.2d 67 (La. App. 1964), and interpreted the will as invalid as directing successive vesting, which was diametrically opposed to the intention of the testatrix.

In short, the Louisiana court construed the will in contravention of the desires of the testatrix, whereas if she had been a resident of Louisiana, every attempt would have been

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domicile should govern on the theory that the properties bequeathed, which were overriding royalty interest, of necessity severed from the soil before coming into being, were properly classified as movables, or personalty, under *Reagan v. Murphy*, 235 La. 529, 105 So.2d 210 (1958), and *Tyson v. Surf Oil Company*, 195 La. 248, 196 So. 336 (1940). It was stipulated in the district court that the bequest was valid under Texas law.

made to determine her true intent as shown by the language of the will, and to carry out her wishes to create interests permitted under Louisiana law. Undeniably there has been a taking of property without due process, as this constitutional guarantee has been recognized as applicable when governmental action destroys existing economic values, *Market St. Ry. Co. v. Commission*, 324 U.S. 548 (1945); 16A C.J.S., Constitutional Law, Sec. 569(1), at p. 541. The fundamental unfairness and unreasonableness in the action of the Supreme Court of Louisiana in dealing with a non-resident on a different footing than that of a Louisiana domiciliary can only be seen as a violation of the rights vouchsafed to petitioner's son by the United States Constitution.

CONCLUSION

The significance of the question presented herein is twofold: first, with respect to the very substantial loss suffered by petitioner's son in the estate his great-grandmother intended for him to have; second, in its far reaching effect on testaments of non-residents probated in Louisiana. It should be recalled that Louisiana is attracting more and more non-resident investors in this era of increasing mobility and prosperity. Such persons will no doubt follow Mrs. Simms' practice of drafting a will covering their Louisiana properties in their home states, using common law terminology used and understood in all of the other forty-nine states of the Union. Should these persons be deprived of having their intentions as expressed in their wills put into effect simply because the Louisiana courts refuse to ascertain their intentions through reference to the law of the testators' domicile? It is not suggested that the effect of such bequests be determined

by the non-resident's domicile, but only the meaning and proper import of the will's phraseology and, therefore, the intent of the testator. Untold millions of dollars worth of property is thereby affected, and the persons to whom it is transmitted are forcibly interfered with by the practice of the Louisiana courts in rendering these non-residents intestate.

By virtue of the manifest breach of the Constitutional guarantees to which petitioner's son is entitled and the thousands of other persons similarly situated who will sustain comparable loss of property as a consequence of the decision of the Supreme Court of Louisiana herein, it is respectfully submitted that a writ of certiorari be granted by this Honorable Court, and that the judgment of the court below be reversed.

Respectfully submitted,

H. ALVA BRUMFIELD
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Baton Rouge, Louisiana

DECATUR J. HOLCOMBE
809 First City National Bank Bldg.
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By: _____
SYLVIA ROBERTS

PROOF OF SERVICE

I, Sylvia Roberts, attorney for petitioner, Dr. Benjamin F. Kitchen, Jr., Tutor of the minor, Benjamin F. Kitchen, III, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing Petition for writ of Certiorari on:

Morris Wright, Esquire
Cobb and Wright
Whitney Building
New Orleans, Louisiana

Sidney Wright, Esquire
Texas National Bank Building
Houston, Texas

counsel for respondents, by mailing a copy thereof, postage prepaid, addressed to their offices as shown above.

Baton Rouge, Louisiana, this _____ day of May, 1967.

SYLVIA ROBERTS

APPENDIX A

UNITED STATES CONSTITUTION
AMENDMENT FOURTEEN

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

November 8, 1965

SUPREME COURT OF LOUISIANA

SUCCESSION	Nos. 47,706
of	47,707
LILLIE WEIR SIMMS,	47,712
widow of	47,713
EDWARD F. SIMMS	CONSOLIDATED

IN RE: ALDEN X. BODDEKER and HENRY C. RIQUELMY, BENJAMIN F. KITCHEN, III, EDWARD F. KITCHEN, ELIZABETH F. KITCHEN and PHILIP MASQUELETTE, under-tutor of said minors, WILLIAM P. HAMBLEN ET AL., and DR. BENJAMIN F. KITCHEN, JR., Tutor of the minor, BENJAMIN F. KITCHEN, III, APPLYING FOR CERTIORARI, OR WRITS OF REVIEW, TO THE COURT OF APPEAL, FOURTH CIRCUIT. PROCEEDINGS ORIGINATED IN THE PARISH OF PLAQUEMINES

HAMITER, Justice.

Mrs. Elizabeth Franzheim Reese instituted this action in which she attacks the last will and testament of her late grandmother, Mrs. Lillie Weir Simms. According to her petition, filed in the succession proceedings of the testatrix, plaintiff attempts to (1) annul certain trust provisions contained

in the will, (2) nullify the will's probate insofar as the trust provisions are concerned, and (3) cancel the district court's judgment which sent into possession the various persons named in such provisions.

All whose interests would be affected by the attack were made defendants, namely, the beneficiaries of the trusts, the trustees, the testamentary executors, and plaintiff's brother and sister.

The district court rendered judgment in favor of plaintiff, as prayed for. Various defendants then appealed to the Court of Appeal, Fourth Circuit, where the judgment was affirmed. 175 So.2d 113. (As pointed out in a footnote in the Court of Appeal opinion, "The last testament of Mrs. Lilly Weir Simms provides that if any legatee or devisee contests it or by legal procedure interferes with the handling of the estate, then that legatee or devisee shall take nothing under her will or out of her estate. For this reason, Kenneth Franzheim, II, has appealed only in his capacity as executor and trustee, and not individually. For the same reason Mrs. Lilly Franzheim McCullar has appealed only in her capacity as provisional administratrix.")

The litigation is presently before us on writs of certiorari granted on the separate applications of some of the defendants. 175 So.2d 111-112.

The case was tried in the district court on a stipulation of facts and on certain pertinent exhibits. According to the record the testatrix (plaintiff's grandmother), whose domicile was in Texas, died on May 1, 1957. She was survived by only one child, Mrs. Bessie Simms Franzheim, who was the mother

of this plaintiff and of Kenneth Franzheim, II, and Lillie Franzheim McCullar, the latter two being among the defendants herein. In her will Mrs. Simms bequeathed to her daughter one-third of her Louisiana property. The remaining two-thirds she left in trust for the benefit of Kenneth Franzheim, II, Lillie Franzheim McCullar, and various great grand-children. Among the latter were plaintiff's three minor children who are also defendants in this action. These trust bequests are the ones assailed in this proceeding. (The controversial provisions of the testament are quoted in full in the opinion of the Court of Appeal. Because of the conclusion we have reached with regard to plaintiff's right to proceed in this action, as hereinafter discussed, we deem it unnecessary to detail them in this opinion.)

Mrs. Simms' succession was opened in Texas, her domicile. In the proceedings there the will was probated and the testamentary executors confirmed. These executors later commenced ancillary probate proceedings in the district court for Plaquemines Parish, Louisiana, and therein sought to have the testament made executory with respect to the Louisiana property affected thereby. On the joint petition of such executors and of Mrs. Franzheim, individually, a judgment was rendered on July 21, 1958, sending the legatees (including the trustees) under the will into possession of the Louisiana estate.

On December 15, 1959, Mrs. Bessie Simms Franzheim, who also was domiciled in Texas, died, she being survived by the three above named children, including this plaintiff. She left a will in which she bequeathed to her son (Kenneth Franzheim, II) and to one of the two daughters (Mrs. Lillie Franzheim McCullar) certain specified property located in Louisi-

ana; and, after a number of particular bequests, she designated those two children as her residuary legatees. Her said son, and W. P. Hamblen and Alden K. Boddeker were named executors. The plaintiff was not mentioned in Mrs. Franzheim's will.

Thereafter, plaintiff filed a suit in Texas attacking the validity of her mother's will. Later, with respect to that testament, ancillary probate proceedings were commenced in Louisiana on the petition of Mrs. McCullar, a resident of this state; and therein she was appointed provisional administratrix of her mother's estate inasmuch as the testamentary executors could not act until their right to do so under the will had been established in the Texas litigation. (In this connection plaintiff, in her brief to this court, notes " * * * Mrs. Franzheim left a will, the validity of which was litigated in Texas, and during the pendency of these proceedings (the instant litigation) its validity was upheld in Texas. Thereafter, it was probated in ancillary proceedings in Plaquemines Parish, as will appear from the substitution of the Testamentary Executors named therein for the Provisional Administratrix in the Succession of Franzheim by order in the Court of Appeal dated December 23, 1964. * * * ") Also see Reese v. Franzheim, 381 S.W. 2d. 329.

Pending the attack on her mother's will in the Texas courts, the plaintiff, on November 27, 1961, filed the instant action in her grandmother's ancillary succession proceeding, she seeking (as we have said) to set aside the trust bequests in the will of Mrs. Simms, the will's probate, and the judgment sending the several legatees (including the trustees) into possession. In this action plaintiff contends that the assailed trust provisions constituted prohibited substitutions under the

laws of Louisiana, and, consequently, they and the judgment purporting to perpetuate them were null and void and of no effect with respect to the Louisiana properties, the result being that her grandmother died intestate as to those bequests so that such properties were inherited by the testatrix's sole forced heir (plaintiff's mother) and should now properly form a part of her mother's succession.

Mrs. Simms' testamentary executors have filed in this court an exception of no right of action in which there is alleged a want of interest in the plaintiff, the exceptors pointing out that she is a stranger to the estate of her grandmother for the reason that she was not an heir of Mrs. Simms and that she acquired no seizin in the succession of her mother, Mrs. Franzheim. (We note that this exception was not filed on behalf of all of the defendant litigants. But we consider this of no importance inasmuch as the failure of right or interest in a plaintiff to institute suit may be noticed by this court of its own motion. Code of Civil Procedure Article 927.)

In the pertinent portions of the brief of plaintiff, where she asserts the basis of her right to proceed in the instant litigation, she contends: " * * * It is not contended by Mrs. Reese that she is the heir of her grandmother. She is the heir of her mother and as such, asserts the same right which her mother had to establish the absolute nullity of the disputed dispositions of Mrs. Simms' will. This is manifest from Articles 944 and 945 of the Civil Code. The heir being considered as having succeeded to the deceased from the instant of his death, the * * * effect of this right is to authorize the heir to institute all the actions, even possessory ones, which the deceased had a right to institute and to prosecute those

already commenced, for the heir in everything represents the deceased and has a full right in his place as well for his rights as his obligations. * * * " In support of this contention plaintiff relies primarily on Hoggatt v. Gibbs, 12 La. Ann. 770 and Cahn v. Brown et al., 160 La. 790, 107 So. 576, and on Articles 940-945 and 1607 of the Louisiana Revised Civil Code.

At the outset we hold that the cited decisions are not authority for such contention. In the Hoggatt case the right or interest of the plaintiff does not appear to have been questioned and is not mentioned in the opinion; nor did the court in any manner consider an issue respecting his seizin. Likewise, in the Cahn case, the right of the plaintiff to proceed was not mentioned. Moreover, he was **the forced heir of his deceased grandfather,** the latter having died **after** the plaintiff's mother. Consequently, plaintiff had every right, **as a forced heir of his grandfather,** to sue to reduce a donation which impinged on his legitime.

Under Article 941 of the Louisiana Revised Civil Code the right of seizin given to the heir by Article 940 is by operation of law alone. Under Article 942 he is "considered" seized of the possession of the succession. Article 945 authorizes such heir with seizin to institute all the actions which the decedent had a right to institute. And Article 1607 provides that forced heirs are seized of right at the death of the testator. However, Article 1659 authorizes the testator to "give his testamentary executor the seizin of the whole of his succession * * *." Therefore, in cases where the testator leaves forced heirs and has given seizin to his testamentary executor there obviously is (under the codal articles) a conflict between such heirs and the executor insofar as the benefits arising out of the right of seizin are concerned.

But in our opinion this obvious conflict can be resolved if we interpret Articles 941 and 1607 to mean that the heir acquires seizin by operation of law on the death of the testator only when the latter in his will has made no other legally authorized disposition of the seizin. (It is our duty to resolve such a conflict if a reasonable construction can achieve that end. See Article 17 Revised Civil Code; City of New Orleans v. Board of Supervisors of Elections for the Parish of Orleans, 216 La. 116, 43 So. 2d. 237; Hall v. Rosteet, 247 La. 45, 169 So. 2d. 903; and Crawford v. Alatex Construction Service, Inc., 120 So. 2d. 845, Court of Appeal, cert. denied.)

The suggested interpretation was given such codal articles in Succession of Serres, 135 La. 1005, 66 So. 342, and it appears to be the last expression of this court on the subject. In that case, which involved a dispute between the forced heir and the testamentary executor with seizin, the court reviewed extensively and in detail the prior jurisprudence, noted that there had been misleading, and perhaps, conflicting statements in the dicta of certain opinions, and concluded that " * * * the law is correctly interpreted in the opinion in Bird v. Succession of Jones, [5 La. Ann. 645] in the statement that: 'The actual seizin of an executor is something distinct from and paramount to the fictitious seizin, which, it is said, is vested in the heir immediately upon the death of the ancestor.' " Therein, prior statements or holdings of the court to the contrary were specifically overruled.

Consequently, if Mrs. Franzheim, in her will, granted seizin to her executors it cannot be said correctly that on her death seizin devolved on plaintiff, as a forced heir, by operation of law.

Article 1660 of the Revised Civil Code provides: "The testator may express his intention to grant the seizin of his estate to the testamentary executor, either in express terms, **by authorizing him to take possession of the whole,** or a part of the estate of his succession after his death, or by merely appointing him testamentary executor and detainer of his estate; * * *." The clause in Mrs. Franzheim's will that appoints the executors reads: "I hereby nominate, constitute and appoint my son, Kenneth Franzheim, II, and W. P. Hamblen and Alden X. Boddeker as **Independent Executors** of my will, and I direct that no bond shall be required of them and that **no other action shall be had in the Court having jurisdiction of my estate relating to the settlement of the same** than the probating and recording of this, my will, and the return of statutory inventory, appraisement and list of claims of said estate and of all claims due or owing by me at the time of my death." (Underscoring ours.)

The statutory law and jurisprudence of Texas relating to the making of wills (of which we are permitted to take judicial notice by Article 1391 of the Code of Civil Procedure and which are pertinent here in determining the intention of testatrix since she was domiciled in such state) permit the appointment of **Independent Executors who are authorized by such designation to take control and custody of the estate for the purpose of completely managing and administering it, independently of and without orders from the probate court, and to have the right to do whatever the testator could have done in his lifetime.** See Vernon's Civil Statutes of the State of Texas, Probate Code Sections 145 et seq.; Hutcherson v. Hutcherson et al., 135 S.W. 2d. 757 (Tex.) and Schramm v. Hoch, 241 SW. 1087 (Tex.). Clearly a grant of that kind to an

Independent Executor evidences an intent to authorize "him to take possession of the whole" of the estate—such as would effect the giving of seizin under our law. (Revised Civil Code Article 1660). It follows, therefore, that since the testamentary executors were granted seizin by Mrs. Franzheim, the seizin did not, on her death, devolve upon her heirs.

Incidentally, the authority given to her executors by Mrs. Franzheim is far broader and greater, it appears to us, than that encompassed in the language used by the testator in Succession of Hale, 26 La. Ann. 195, as follows: "I do hereby appoint my wife Josephine Jones the natural tutrix and executrix under this will, relying on her good judgment and discretion in the administration for the benefit of herself and children. * * * " On an opposition by the heirs to the executrix's receiving a commission, they alleging that she was not given seizin of the property by the will, this court approved the ruling of the district court which was: " * * * It appears * * * that it is sufficiently clear, from the tenor of the will, that the testator had the desire to give the seizin to the executrix. **Any disposition or recommendation from the testator to his executor in regard to the mode in which his property is administered, is a sufficient indication of his desire to grant the seizin.** That it is not necessary that the word seizin be inserted in the will to confer the power. * * * " (Underscoring ours.)

Moreover, we note that the instant action was not instituted until November 27, 1961, or after the effective date of the new Code of Civil Procedure; and in her brief to this court plaintiff recognizes that, even though the litigation was filed in the original succession proceedings, it is controlled by the provisions of that Code. As a consequence, Article 3211 thereof

seems to eliminate the provisions of Article 945 of the Revised Civil Code which authorize the heir with seizin to institute all actions that the deceased had a right to bring. It provides: "**A succession representative** shall be deemed to have possession of all property of the succession and shall enforce all obligations in its favor." And in the "Official Revision Comments" found thereunder it is said: "(a) This article is a departure from the law relating to seizin. The utility of the concept of seizin in Louisiana law is doubtful since as a practical matter the succession representative has full seizin of all the property of the deceased. McMahon 1688, n. 211." (Underscoring ours.)

Inasmuch as plaintiff was not an heir of her grandmother (her mother, Mrs. Franzheim, was living at the time of the testatrix's death), she is a stranger to Mrs. Simms' succession. Also, since she did not acquire seizin of her mother's estate she was without right or interest to attack her grandmother's testament or the probate proceedings connected with it.

Of course, as a forced heir of her mother plaintiff has a right to demand a reduction of the bequests left by Mrs. Franzheim. But a demand of that kind is not made in this action.

In a supplemental brief filed here, following the submission of this case, the plaintiff confidently asserts that Cox et al. v. Von Ahlefeldt et al., 50 La. Ann. 1266, 23 So. 959 completely sustains her position that she can maintain this action as one which her mother could have instituted. But even a cursory reading of that opinion reveals that such decision is not at all controlling.

In the Cox case the deceased grandfather had disposed by will of all of his property in Louisiana without providing for a grandchild, Susan Robinson, who was living at his death and (as pointed out in the opinion) **was a forced heir** inasmuch as her mother (the testator's daughter) **had predeceased the testator. Without having taken any part in her grandfather's succession in this state, or in the distribution of the effects thereof,** Susan died. Within the time permitted by law collateral heirs of Susan brought suit to have the latter recognized as a forced heir of her grandfather, entitled to her legitime, and to have her grandfather's bequests reduced accordingly. The legatees urged that the collateral heirs of Susan had no right to bring the action because such right would devolve only on forced heirs of the forced heir. However, the court held that under the explicit language of Article 1504 **any heir** (as well as an assignee) of a forced heir could bring **an action for the reduction of excessive donations.**

That case is not applicable here because (among other reasons) this **plaintiff is not suing to reduce the bequests of Mrs. Simms as exceeding the disposable portion** and to recover the legitime owing to the now deceased daughter, Mrs. Franzheim. And even if she were she could not succeed for the obvious reason that Mrs. Simms' bequests did not exceed the disposable portion. Rather, the testatrix specifically bequeathed to the only forced heir (plaintiff's mother) the portion legally due her.

For the reasons assigned the judgment of the Court of Appeal is reversed and set aside, the peremptory exception of no right of action is maintained, and plaintiff's suit is dismissed. All costs are to be borne by plaintiff.

APPENDIX C

Monday, November 7, 1966

SUPREME COURT OF LOUISIANA

SUCCESSION OF

LILLIE WEIR SIMMS,

widow of

EDWARD F. SIMMS

No. 47,706
47,707
47,712
47,713

CONSOLIDATED

ON REHEARING

FOURNET, Chief Justice.

Mrs. Lillie Weir Simms, widow of Edward F. Simms, died testate in Texas, where she lived, on May 1, 1957, leaving surviving her one daughter, Mrs. Bessie Simms Franzheim. The major portion of her estate consisted of (1) real and immovable property in St. Martin Parish, Louisiana, and (2) oil producing leasehold and royalty rights affecting real or immovable property in the parishes of Acadia, Cameron,

HAMITER, J., dissents, he adhering to the conclusion and reasons therefore assigned by him on the original hearing.

HAWTHORNE, J., concurs in the decree.

McCALEB, J., concurs with written reasons.

HAMLIN, J., concurs in part and dissents in part with written reasons.

SANDERS, J., concurs in the overruling of the exception of no right of action and dissents on the merits and will assign written reasons.

Lafourche, Plaquemines, and St Martin. The total value of her estate in Kentucky, Louisiana, and Texas was $7,075,533.56, the Louisiana portion thereof being valued at $5,876,155 for federal tax purposes, $3,038,000 of which is the estimated value of the property in Plaquemines Parish.

Mrs. Simms acquired the Louisiana property in 1954 when the Southern Sulphur Corporation was liquidated, she, as principal stockholder, being granted 69.30% of the corporation's interest in the St. Martin realty and State Leases Nos. 192, 194, and 195, then being developed by the Gulf Refining and Superior Oil companies as assignees. Of this amount ½ was placed in the inter vivos trusts created by Mrs. Simms in 1954 referred to in her will. The remaining ½ constitutes the Louisiana portion of her estate.

In her will, Mrs. Simms bequeathed ⅓ of her Louisiana estate to Mrs. Franzheim, as the portion to which she was entitled under the law of this state. After certain specific bequests, she disposed of the remainder of her estate in Article XIX of the will, which forms the basis for this litigation, and which reads as follows:

"All the rest, residue and remainder of my estate, real, personal and mixed, of whatsoever kind and character and wheresoever situated, I give, devise and bequeath as follows:

> "(A) One-half (½) thereof in Trust to Bessie Franzheim, Kenneth Franzheim II, Alden X. Boddeker, Henry C. Riquelmy and W. P. Hamblen, and their successors, the Trustees named in the LILLIE WEIR SIMMS TRUST FOR LILLIE FRANZHEIM McCULLAR, which Trust Agreement is recorded under file #69835 in Book 103 of Conv., Page —, and Book 1 of Don., Page —), et seq.,

in the Parish of Cameron, State of Louisiana,[1] to be held and administered by them and the income from which shall be invested or distributed at the sole discretion of said Trustees, and shall be held by said Trustees and their successors with the same rights, powers and duties as are set forth in the above named Trust Agreement, save only that the income from the properties herein bequeathed to them as such Trustees may either be invested by them or distributed to the beneficiary, at their sole discretion, and said beneficiary shall not have the right to demand any distribution to her should the Trustees, in their sole and unlimited discretion, decide that such distribution is either unnecessary or unwise. Said properties herein bequeathed to said Trustees shall be held by them for and during the natural life of my said granddaughter, LILLIE FRANZHEIM McCULLAR, if she survives me, and after her death or my death, whichever occurs last, said properties shall pass to my great-grandchildren LILLIE CELESTE McASHAN, KENNETH ALEXANDER McASHAN, ELIZABETH SIMMS McASHAN and MICHAEL M. McCULLAR, share and share alike, subject to the provisions of Paragraph (C) hereof.

"B. [in this paragraph Mrs. Simms bequeathes the other half of the remainder of her Louisiana property to the named trustees of the inter vivos trust established in 1954 for the benefit of her grandson, Kenneth Franzheim, II, under identical words and conditions as those contained in the testamentary trust for Mrs. McCullar, except that this portion of her estate would, after the death of Mrs. Simms and/or Kenneth Franzheim, II, whichever occurred last, pass to the seven great-grandchildren of Mrs. Simms, i.e., the four children of Mrs.

1. This inter vivos trust agreement is sought to be incorporated in the will by reference only, as are all of the others sought to be made a part of the seven created under Paragraph (C).

McCullar listed in Paragraph A, and the three children of Mrs. Elizabeth Franzheim Reese, the plaintiff, by her marriage to Dr. Benjamin F. Kitchen.]

"(C) In the event that at the time of the vesting of such properties in my said great-grandchildren, any of my said great-grandchildren named herein should be under the age of twenty-one (21) years, then and in that event the properties herein bequeathed to such minor shall pass to and become the properties of the Trustees of such great-grandchildren under the trusts which I have heretofore created and which I now create as follows:

"(1) LILLIE WEIR SIMMS TRUST FOR LILLIE CELESTE McASHAN being file number 69836 and recorded in Book 103 of Conveyance and Donation Book 1, Cameron Parish, Louisiana;

"(2) LILLIE WEIR SIMMS TRUST FOR KENNETH ALEXANDER McASHAN bearing file number 69837 and recorded in Book 103 of Conveyance and Donation Book 1, Cameron Parish, Louisiana;

"(3) LILLIE WEIR SIMMS TRUST FOR ELIZABETH SIMMS McASHAN bearing file number 69838 and recorded in Book 103 of Conveyance and Donation Book 1, Cameron Parish, Louisiana;

"(4) LILLIE WEIR SIMMS TRUST FOR BENJAMIN FORD KITCHEN, III, bearing file number 69834 and recorded in Book 103 of Conveyance and Donation Book 1, Cameron Parish, Louisiana;

"(5) LILLIE WEIR SIMMS TRUST FOR EDWARD SIMMS KITCHEN bearing file number 69833 and recorded in Book 103 of Conveyance and Donation Book 1, Cameron Parish, Louisiana;

"(6) LILLIE WEIR SIMMS TRUST FOR ELIZABETH FRANCES KITCHEN bearing file number 69832 and recorded in Book 103 of Conveyance and Donation Book 1, Cameron Parish, Louisiana;

"(7) As to MICHAEL M. McCULLAR, who has no trust provided for him set out above, if at the time of the vesting of such properties in him he be under the age of twenty-one (21) years, then the share bequeathed to him shall pass to and become the properties of these Trustees: W. P. Hamblen, Alden X. Boddeker, Henry C. Riquelmy and Bessie Franzheim. Such trust shall be created for the same length of time as is provided in the trusts set out in the paragraphs numbered (1) through (6) above, so that the Trustees in this trust, if created, shall hold said properties in trust for such minor child in the same manner as is provided in the trusts above named. Said Trustees shall execute an instrument in writing recordable in the parishes in Louisiana in which my property may be situated acknowledging that they hold said property in trust, and such instruments shall set out the terms and conditions of said trusts as are set forth in these six (6) trusts above referred to.[2]

"(The trust agreements set out in Paragraphs (1) through (6) above are recorded in other parishes in Louisiana, but these references are given for the purpose of identifying the Trustees and the trust properties which shall pass in the event any of my properties shall go to any of the above named great-grandchildren under said trusts.)

"Such portion of my estate going to Trustees of any of my said great-grandchildren under this, my will, shall be held, managed and administered by said Trustees in the same manner, to the same extent, and with the same

2. At the time Mrs. Simms executed her will, as well as at the time of her death, Kenneth Franzheim, II, had no children.

duties as are conferred in the Trust Agreements set out in Paragraphs (1) through (6) above, and shall be held by such Trustees for the same term as set forth in such Trust Agreement, whereupon said properties herein bequeathed and the accumulations shall be paid over to my great-grandchildren."

Mrs. Simms directed that no bond should be required of the five named executors of her estate,[3] "and that no action shall be had in the Court having jurisdiction of my estate relating to the settlement of the same than the probating and recording of * * * my will, and the return of statutory inventory, appraisement and list of claims of said estate and of all claims due or owing by me at the time of my death." She further provided that any legatee or devisee contesting the will or seeking to interfere legally with the executors and/or trustees in their handling and disposition thereof would take nothing thereunder.[4]

Following the mandate of the testatrix, the executors probated the will in Texas on May 21, 1957, and, on June following, instituted ancillary proceedings in Plaquemines Parish in accordance with the provisions of Article 1220 of the Revised Civil Code.[5] On July 21, 1958, by ex parte judg-

3. These are: Mrs. Bessie Franzheim, her daughter, now deceased; Kenneth Franzheim, II, her grandson; W. P. Hamblen, Sr., her attorney; and Alden X. Boddeker and Henry C. Riquelmy.

4. In brief filed in this court, William P. Hamblen, Jr., son of Mrs. Simms' attorney in Texas and an executor of Mrs. Franzheim's will, questions the legality of such a provision under Louisiana law, which would prevent legal and forced heirs from asserting their rights in the successions of their relatives. He further advises it was this provision that kept Mrs. Franzheim from attacking the validity of her mother's will, not any particular desire to acquiesce in it because of a natural obligation to do so, or to validate it if invalid in law, as there was a substantial estate outside of Louisiana where the will might be valid and she would risk loss of this portion if she took adverse action in Louisiana.

5. This was the controlling provision when the succession was opened, as well as laws enacted implementing it, as the effective date of the new Code of Civil Procedure, adopted in 1960, was January 1, 1961.

ment, Mrs. Franzheim and the trustees were placed in possession of the property, the latter with the same rights, powers, and duties as under the inter vivos and testamentary trust agreements, which were made a part of the will and judgment by reference alone. They were required to furnish no bond.

Prior to the filing of any accounting by the executors, to their turning the properties in the succession over to the trustees and heir,[6] prior to the time final settlement was made with the federal government for the inheritance and estate taxes due, and prior to the discharge of the executors, Mrs. Franzheim died testate in Houston, Texas, on December 15, 1959, leaving surviving her three children: Mrs. Elizabeth Franzheim Reese (the plaintiff here), Mrs. Lillie Franzheim McCullar, and Kenneth Franzheim, II.

Her will was offered for probate in Texas, with ancillary proceedings being filed in Plaquemines Parish on Jannuary 21, 1960, by Mrs. McCullar through Louisiana attorneys, she, as heir residing in this state, seeking to be appointed administratrix since the three executors named in the will[7] were unable to qualify because the validity thereof was under attack in Texas.[8] In this petition she alleged that Mrs. Franzheim "left

6. In stipulation of fact drawn May 31, 1963; it is stated: " * * * the trustees under the testamentary trusts * * * have neither received nor disbursed any funds and have established no records of accounts."

7. These are: Kenneth Franzheim, II, W. B. Hamblen, *Jr.*, and Alden X. Boddeker. Mr. Boddeker does not appear in this case in this capacity, only as an executor under the Simms will.

8. This was attacked on a technicality only, i. e., that the witnesses were not informed they were witnessing the signing of a will. Following trial, the will was probated on February 20, 1962, but an appeal followed, which was sustained on July 9, 1964, with rehearing denied August 6, 1964. See, 381 SW 2d 329. The executors were issued letters testamentary October 27, 1964, in Texas. The will was probated in the ancillary proceedings in Louisiana on December 23, 1964, and the executors appointed on that day by the district court. Mrs. McCullar's provisional appointment terminated when they qualified on December 28, 1964, and they were substituted as parties in the appellate court in her stead on January 20, 1965, shortly after the appellate court decision, which was rendered on January 11, 1965. See, 175 So. 2d 118.

as her sole and only children and forced heirs," the three named in the preceding paragraph, including the plaintiff. Her brother, Kenneth Franzheim II, as one of the named executors, joined her in the petition, expressing a willingness to serve as executor once the "restraints of the law" were removed. Mrs. Reese opposed her sister's appointment, and it was not until November 2, 1961, when it became necessary for someone to act in connection with the renewal and extension of the mortgage note executed in connection with securing funds to pay inheritance taxes in the Simms succession, that Mrs. McCullar's appointment was approved. However, her appointment was as provisional administratrix only.

Thereafter, Mrs. Reese, as a daughter and forced heir of Mrs. Franzheim, instituted the instant action in Plaquemines Parish in the Simms succession under the provisions of Article 2931 of the Code of Civil Procedure,[9] contending Article XIX of the will of her grandmother, under which the trusts were sought to be established and the remainder of the Louisiana property placed therein under the conditions set forth, contains substitutions prohibited under the laws of Louisiana, and the will, to this extent, is invalid, as is also the portion of the ex parte judgment rendered July 21, 1958, placing the heirs and trustees in possession of this property. She sought judgment (1) annulling the will and judgment of possession provisions violative of law; (2) recognizing her as a forced heir of her mother, and, as such, entitled to ⅓ of all of her property in Louisiana; and (3) for an accounting from all parties receiving any portion of this property.

As defendants she joined the following parties: (1) Ken-

9. Since these codal provisions were effective from January 1, 1961, this was the controlling law at the time the suit was filed.

neth Franzheim II, individually as a beneficiary of one of the testamentary trusts, and in his capacity as executor and trustee under the Simms will; (2) Mrs. Lillie Franzheim McCullar, individually as a beneficiary under the testamentary trust, in her capacity as natural tutrix of her minor children, and as provisional administratrix of her mother's succession; (3) the seven minor children of Mrs. McCullar and the plaintiff as beneficiaries under secondary testamentary trusts, through their legal representatives;[10] and Alden X. Boddeker, Henry Riquelmy, and W. P. Hamblen, Sr., as executors and trustees under the Simms will.

All of the defendants[11] excepted to the court's jurisdiction rationae personae and materiae, predicated on the contention they were non-residents of Louisiana[12] and were then *functus officio* because the succession matter terminated with the rendition of the judgment of possession. They also excepted to the court's venue "in respect to the real estate, royalties, oil, gas and other mineral rights or leases bearing upon lands or properties located outside of Plaquemines Parish," including in particular the St. Martin Parish property and that covered by State Lease No. 194.[13]

In a well considered opinion the trial judge correctly disposed of all of these exceptions, holding: (1) The court had jurisdiction rationae personae as the succession proceeding

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10. These are: (1) The four children of Mrs. McCullar, three issue of her marriage to Samuel A. McAshan and one issue of her marriage to Myrlin McCullar, and (b) the three children of Mrs. Reese, issue of her marriage to Dr. Benjamin F. Kitchen, Jr.

11. It does not appear exceptions were filed on behalf of the Kitchen minors.

12. Mrs. McCullar, as a resident of New Orleans, did not except to the petition rationae personae in any capacity.

13. Although there is no such indication in the exceptions, in his reasons the trial judge states it was also apparently urged the court had no jurisdiction whatsoever with respect to the property (not merely the part lying outside Plaquemines Parish), as they were movables controlled by Texas law.

did not terminate with the rendition of the judgment of possession, numerous steps having to be taken thereafter by the executors in furtherance of their duties as such; in addition, that they had sufficient contact with the court to be subject to its jurisdiction under Article 6 of the Code of Civil Procedure in the light of the holding in McGee v. International Life Ins. Co., 356 US 220, 78 S Ct 199, 2 L ed (2) 223 (see, also, Morrison v. New Hampshire Co., No. 48,077 on our docket, handed down June 6, 1966, — La. —, — So. 2d —); (2) it had jurisdiction rationae materiae for the purpose of determining the validity of the will probated in the prior succession proceedings in the same court, citing Articles 45, 81, 2006, and 2931 of the Code of Civil Procedure; (3) the court had venue under Articles 2006 and 2931, and also under Article 80, inasmuch as the property extended into a number of parishes and suit could be brought in any one where the property was located; and, finally, (4) mineral and royalty rights affecting land and property in Louisiana are classified as real and immovable incorporeals under the law and jurisprudence of Louisiana, and, as such, are subject to Louisiana laws of descent and distribution.

After these exceptions had been overruled, all defendants answered, denying generally the allegations of the petition, and particularly that the trust provisions of the will were invalid under Louisiana law or contrary to its public policy. For the first time they took the position the plaintiff was without right to attack the validity of these trusts and the judgment of possession since she was not an heir under the will and possessed no greater rights in the Simms estate than did her mother, who, during her lifetime and by her actions ratified these provisions, and, if living, would be estopped to now assert their invalidity.

The case was heard on the merits under a stipulation of facts concurred in by all counsel and parties, to which was attached (1) a copy of all of the inter vivos trust agreements executed by Mrs. Simms in 1954, which had been made part of the will by reference only; (2) all documents through which Mrs. Simms deraigned her title to the succession property in Louisiana; (3) documents dealing with the payment of taxes by the estate, including the note and mortgage executed in favor of a Texas bank as security for the money advanced for this purpose; and (4) the ancillary proceedings for the probate of the will in the Succession of Franzheim.[14]

The trial judge, on February 14, 1964, rendered judgment with carefully delineated written reasons in which he recognized Mrs. Reese to be a forced heir of her mother, and decreed the nullity of Article XIX of the Simms will and the ex parte judgment placing Mrs. Franzheim and the trustees in possession of the Louisiana property.

From this judgment Kenneth Franzheim II specifically refrained from appealing individually as a testamentary trust beneficiary under his grandmother's will, as did Mrs. McCullar, who, additionally, refrained from appealing as the provisional administratrix of the will of her mother. Kenneth Franzheim II appealed only as an executor under his grandmother's will and as a trustee of the several trusts for the benefit of the minors and of his sister thereunder. The latter limited her appeal to her capacity as natural tutrix of her minor children.

The judgment of the district court was affirmed by the Court of Appeal for the Fourth Circuit in a well considered

14. Although in her petition Mrs. McCullar alleged Mrs. Reese was a forced heir of their mother, judgment was not rendered recognizing her as such until December 23, 1964. See Footnote No. 7.

unanimous opinion handed down January 11, 1965, wherein all of the issues — including those raised by way of exceptions, and particularly the exception of no right of action and estoppel as set out in the answers — were clearly stated and solved according to the applicable laws of Louisiana, the court concluding Article XIX of Mrs. Simms' will constituted substitutions prohibited by Section 16 of Article IV of the Constitution of Louisiana and Article 1520 of the Revised Civil Code and the jurisprudence thereunder, and, accordingly, that the ex parte judgment rendered pursuant thereto was null and of no effect. See, 175 So. 2d 113.

Following this, the executors named in Mrs. Franzheim's will, who had by court order and judgment rendered in the district court December 23, 1964, been appointed to administer her succession, were substituted as parties in the appellate court on January 20, 1965, in lieu of Mrs. McCullar, whose appointment as provisional administratrix of this succession terminated when these executors qualified on December 28, 1964.

For a review of the appellate court judgment, writs of certiorari were granted by us on the applications of: (1) Alden X. Boddeker and Henry C. Riquelmy, as executors and trustees under the Simms will (No. 47,706); (2) the Kitchen minors (No. 47,707); (3) the minor children of Mrs. McCullar and also W. P. Hamblen, Sr., as an executor and trustee under the Simms will (No. 47,712); and (4) Dr. Benjamin F. Kitchen, Jr., as tutor of his minor son Benjamin (No. 47,713.)[15]

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15. Kenneth Franzheim II had appealed to the Court of Appeal as trustee and executor under the Simms will. However, he sought no rehearing of the judgment there rendered and did not apply for a writ to this court in this capacity.

In these applications the parties now collectively complain the Court of Appeal erred in holding: (1) The trial court had venue of the action and also jurisdiction rationae personae and materiae; (2) overriding royalties created in 1935 and 1936 out of mineral leases granted in 1928, prior to the legislative characterization of such rights,[16] are real and/or incorporeal immovables, the descent and distribution of which is controlled by Louisiana law; (3) Mrs. Reese inherited from her mother the right to attack the testamentary trusts despite her mother's construction as to their validity and her acquiescence therein;[17] and (4) Article XIX of the will placing the remainder of the Louisiana property in the trusts contains prohibited substitutions null and void under the laws of Louisiana and violative of the public policy of the state. In Dr. Kitchen's application counsel urge, further, the action of the court in invalidating the trust provisions by application of Louisiana law abridges the equal protection guarantees of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and also the privileges and immunities provisions to be found in Section 2 of Article IV of this constitution.

Although still pressing the exceptions decided adversely in the lower courts, two of the executors under the Simms

16. Act 205 of 1938 (R. S. 9:1105).

17. W. P. Hamblen, Jr. who is apparently associated in the practice of law in Texas with his father, Mrs. Simms' attorney, as an executor under the will of Mrs. Franzheim, the only and forced heir of Mrs. Simms, neither supported nor opposed the action of other defendants in seeking writs; he did, however, file a memorandum here asserting not only Mrs. Franzheim but Messrs. Boddeker and Riquelmy were informed by counsel there were legal problems connected with the testamentary trusts in the Simms will under Louisiana law, and Mrs. Franzheim's action in securing the ex parte judgment in 1958 was prompted by her apprehension she would risk loss of the portion of her mother's estate outside Louisiana, as pointed out in Footnote No. 4; consequently, that the statements in the writ filed by these executors to the effect Mrs. Franzheim by this action validated absolutely invalid will provisions and rendered them unassailable, as well as evidenced her opinion that the trusts were legal, and that of her counsel, are "unsound and not factually correct."

will—Messrs. Boddeker and Riquelmy—who sought a writ here, obviously realized it was unlikely this court would reverse these judgments based on our prior jurisprudence, particularly in the face of the positive reprobation of prohibited substitutions in the constitution and the civil code; they therefore filed in this court another exception—termed "peremptory"—of no right of action on the part of Mrs. Reese to attack the validity of Article XIX of the will and the judgment of possession in so far as pertinent thereto.

This exception was sustained on original hearing, without consideration of the other exceptions or the merits of the case, and the suit dismissed.

Mrs. Reese timely filed an application for a rehearing, and, in his capacity as an executor under both the Simms and Franzheim wills, so did her brother, Kenneth Franzheim II. Both seek a reversal of our original judgment and pray that a decision be rendered on the merits.

In his capacity as executor under the will of Mrs. Simms, Kenneth Franzheim II asserts in brief in support of his request for a rehearing: "It is difficult to understand why Messrs. Boddeker and Riquelmy, as two of the four executors of the Succession of Mrs. Simms, filed in this court, at the late date of September 28, 1965, the exception of no right of action and of lack of interest in the plaintiff. The facts and the law upon which Messrs. Boddeker and Riquelmy base this exception were well known to them when these proceedings were instituted on November 27, 1961. Nonetheless, Messrs. Boddeker and Riquelmy did not, at the outset of this litigation elect to question the claimed want of capacity of Mrs. Reese but elected, on the contrary, to litigate with her as though

she possessed such capacity, and it was only after Messrs. Boddeker and Riquelmy were unsuccessful in two courts that they then elected to question her capacity, apparently in the hope that they could defer the day of reckoning by the belated use of this bit of legal advocacy." Mr. Franzheim further points out that the effect of our original decision is to leave this estate in the hands of executors for another long and indefinite period with unbridled power over its disposition, and who are required to make no accounting under the very terms of the will and have already had their bond cancelled.

In his capacity as executor under the Franzheim will, Kenneth Franzheim II urgently pleads that "justice cries out for a determination" of the merits of the case, thereby obviating the necessity of "subjecting the parties * * * to further expense and protracted litigation that must arrive ultimately at the same point at which the parties have now arrived in this present litigation," observing the case has already been in the court since November 1961 and the Code of Civil Procedure expressly provides "the appellate court shall render any judgment which is just, legal, and proper on the record on appeal" (Article 2164), and, further, that once this court granted the writ, it has "the same power and authority in the case as if it had been carried directly by appeal." Section 11 of Article VII of the Constitution of 1921. He stresses that inasmuch as all parties at interest are now properly before the court, including the executors who were held on our original hearing to have had the seizin necessary to maintain such an action, the case should not be "abunted aside" on the technicality purportedly found in the magic word of *seizin*, and thus leave title to the remainder of the Louisiana property in an uncertain and unmerchantable status in view of the

two lower court judgments that stand upon the public records condemnatory of the trust provisions of the will, the added expense attendant upon further litigation falling ultimately on the heirs if the matter is not decided on the merits now.[18]

Careful consideration of the exceptions filed in limine reveal both the lower and appellate courts correctly overruled these for the reasons hereinabove set out, and no useful purpose can be served by burdening this already lengthy opinion by reiterating these here in the main. However, as to the characterization of the leasehold and overriding royalty rights in the Simms estate as movables controlled by Texas law is concerned,[19] as urged under the exception rationae materiae, we deem this sufficiently vital and important to treat this phase of the case more fully in affirming the rulings of the lower courts in this respect.[20]

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18. As an example of some of the difficulties encountered by reason of the failure of the court to pass on the merits, Kenneth Franzheim II points out in application that because the Franzheim estate was increased three-fold under the lower court judgment invalidating the trust provisions, the federal government levied in excess of $600,000 and the state in excess of $200,000 additional estate taxes, and it cannot be determined whether these amounts were legally paid or are subject to refund until the validity of the trust provisions is finally passed on by this court.

19. "The form and effect of public and private written instruments are governed by the laws and usages of the places where they are passed or executed. **But the effect of acts passed in one country to have effect in another country, is regulated by the laws of the country where such acts are to have effect.** The exception made in the second paragraph [the underscored portion] of this article does not hold, when a citizen of another State of the Union * * * disposes by will or testament * * * of his **movable** property situated in this State, if at the time of making said will * * * or any other act causa mortis, and at the time of his death, he resides and is domiciliated out of this State." Article 10 of the Revised Civil Code. (The emphasis has been supplied.)

20. In amicus curiae brief the Attorney General of Louisiana points out that if these rights are characterized as movables, this will have the effect of removing this property from the state's control and placing it in the hands of non-resident trustees not amenable to Louisiana law, not only permitting states from whose soil the properties were not taken to tax them, particularly for inheritance purposes, but require Louisiana "to look to strange and foreign laws to determine questions of ownership with respect to" valuable leasehold rights and overriding royalties affecting real and/or immovable property in our state.

These rights, which arise principally under lease contracts affecting immovable property in Louisiana that were granted by the state in 1928 to Mrs. Simms' ancestor in title, are controlled by the pertinent portions of the following articles of the Revised Civil Code of 1870:

> "**There are things immovable** by their nature, others by their destination, and others **by the object to which they are applied.**" Article 463.
>
> "**Incorporeal things, consisting only of a right,** are not of themselves susceptible of the quality of movables or immovables; nevertheless they **are placed in one or the other of these classes, according to the object to which they apply** and the rules hereinafter established." Article 470.
>
> "When obligations are attached to immovable property, they * * * are called real obligations" (Article 2010), which "may be created * * * By alienating * * * some real right to be exercised upon it." These contracts give rise to obligations that are purely real. The owner of the land is not liable therefor, "**but the real property is.**" Article 2012.
>
> "Not only servitudes, but **leases** and all other rights, **which the owner has imposed on his land * * * form real obligations** which accompany it in the hands of the person who acquires it * * *." Article 2015.
>
> (The emphasis throughout has been supplied.)

This was the law in 1928 when the state granted its State Leases Nos. 192, 194, and 195, wherein it gave the lessor the right to go upon state-owned waterbottoms and land for the purpose of extracting from its soil such minerals as might

be found thereunder, reducing these to possession for sale or personal use. It was also the law in 1935 and 1936 when the ancestor in title of Mrs. Simms assigned this right to others under condition that it, its heirs, or assigns retained the right to a portion of the minerals recovered from the soil, or the value thereof, as well as certain reversionary rights under the original contracts. And it was the law in 1957 when Mrs. Simms died in Texas, and also when the executors under her will instituted ancillary proceedings in Plaquemines Parish for the purpose of bringing her leasehold and overriding royalty interests in these leases into the mass of her succession for distribution according to law, stating in the petition that **Mrs. Simms "owned an interest in immovable property situated within the State of Louisiana and in several Parishes in said State,** the greater portion of which in value was situated within the Parish of Plaquemines;" and listing on the statement of estate taxes due Louisiana **all of the property in this state as "REAL ESTATE."** (The emphasis has been supplied.)

The cases of Gulf Refining Company v. Glassel, 186 La. 190, 171 So. 846, and Regan v. Murphy, 235 La. 529, 105 So. 2d 210, relied on by relators, are clearly inapposite from a factual and legal standpoint. While they may derive comfort from some language used in these cases, the former is only authority for the proposition that under the law and jurisprudence of this state a lessee was without right to institute a petitory or possessory action without the concurrence and/or consent of the landowner-lessor. When the legislature next met following this decision, it adopted its Act 205 of 1938, specifically granting such right to a mineral lessee.[21] And the Regan case

21. R. S. 9:1105, as amended by Act 6 of the Second Extra Session of 1960.

is only authority for the proposition that the rights granted mineral lessees in the 1938 act, as amended by Act 6 of the Second Extra Session of 1950, did not render mineral leases amenable to the liberative prescription of ten years under either Article 3520 or 3546 of the Revised Civil Code.

These statutes and the jurisprudence thereunder did not have the effect of overruling the above quoted codal provisions which place incorporeal things, consisting only of rights that are not "of themselves strictly susceptible of the quality of movables or immovables," such as leases, in one classification or the other, according to the object to which it applies. Thus a contract leasing a movable is, under the code, classified as a movable, whereas a contract leasing an immovable is classified as an immovable. In the latter case, the real property is, itself, liable for the obligation. It is for this reason that all contracts and donations affecting realty must be, as is required for the transfer of real property, in writing and recorded in the parish where the immovable to which they apply is situated to be legally effective. Hackenburg v. Gartskamp, 30 La. Ann. 898; Perrault, 32 La. Ann. 635; Hanby v. Texas Co., 14 La. 189, 72 So. 933; Scurto v. Le Blanc, 191 La. 136, 184 So. 567; Ingolin v. Lobrano, 244 La. 241, 153 So. 2d 7; and Hayes v. Muller, 245 La. 356, 158 So. 2d 191.

To hold otherwise would not only call for us to overrule and wipe from the code all of the above quoted articles and the jurisprudence thereunder, but would also be unthinkable, since, as pointed out in the appellate court decision, "the State of Louisiana, in order to maintain the integrity of its public records system, should not be forced to look, in either its sovereign or proprietary capacity, to the laws, decisions, or

proceedings of another state in order to determine the ownership or possession of its own mineral rights." And, as the Attorney General so well puts it in his brief amicus curiae, this would permit a foreign state to levy inheritance taxes upon the disposition of these interests at death—long prior to the date at which they are to be severed from our soil, and which, until that moment, remain the state's most valuable property.

We now pass to the exception of no right of action filed in this court after these writs were granted. The basis for this exception is not to be found in the instrument itself, but we gather from argument it is that Mrs. Reese is a stranger to her grandmother's estate as she is not an heir thereto since her mother was living at the time Mrs. Simms died, and, inasmuch as her mother died testate, leaving a will in which she placed seizin of her estate in named executors, **seizin** did not and could not devolve upon Mrs. Reese as a forced heir by operation of law.

This exception is clearly without merit. Counsel overlook the fact that even though Mrs. Franzheim in her will gave the testamentary executors seizin of her estate, under Louisiana law controlling at the time "**this seizin can not continue beyond a year and a day from the decease of the testator**, if he died in the State, **or from the day on which his death was first known, if he died out of the State**" (Article 1659 of the Revised Civil Code),[22] their duties thereafter being limited to

22. Although these articles were repealed by Act 30 of 1960 (Code of Civil Procedure), the effective date thereof was January 1, 1961, which was subsequent to the date on which the rights here involved vested in the plaintiff; consequently, the provisions of Articles 1659 and 1671 control the determination of this issue. According to the explanatory note under Article 1659 showing this repeal, it is stated the doctrine of seizin is discarded under the new code. However, under this code the heir of either a testate or intestate succession can secure possession of all or part of

seeing that the estate is finally wound up and the testament faithfully executed (Articles 1673 and 1672 respectively); furthermore, that **"The heirs can, at any time, take the seizin from the testamentary executor,** by offering him a sum sufficient to pay the movable legacies and on complying with the requirements of article 1012." Article 1671.[22] (The emphasis has been supplied.)

Counsel have also overlooked the many other pertinent provisions to be found in Book III of the Revised Civil Code dealing with the different modes of acquiring the ownership of things, and particularly the titles thereunder controlling successions, among which are the following:

> "Succession is the **transmission of the rights** and obligations **of the deceased to the heirs.**" Article 871.
>
> **"The person who has become the • • • successor of the deceased • • • is called the heir,** no matter whether he be such by law, by the institution of a testament or otherwise." Article 884.
>
> "If there is no testament or institution of heir, or **if the institution is null or without effect, the succession is then open in favor of the legitimate heirs, by the mere operation of law."** Article 886.
>
> **"Legitimate children • • • inherit from their father and mother • • • in equal portions and by heads • • • by their own right • • •."** Article 902.
>
> **"A succession is acquired by the legal heir, who is called by law to the inheritance, immediately after the death of the deceased person to whom he succeeds.** This rule applies also to testamentary heirs, to instituted heirs

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the succession at any time prior to the homologation of the tableau of the final distribution by following the procedure therein set out. See, Articles 3362 and 3372.

and universal legatees. * * * " Article 940. See, also, Article 1607.

"The right mentioned in the preceding article is acquired by the heir by the operation of law alone, before he has taken any step to put himself in possession, or has expressed any will to accept it. * * * " Article 941. See, also, 1607.

"The heir being considered as having succeeded to the deceased from the instant of his death, the first effect of this right is that the heir transmits the succession to his own heirs * * *." Article 944.

"The second effect of this right is to authorize the heir to institute all the actions * * * which the deceased had a right of institute * * *." For the heir, in everything, represents the deceased, and is of full right in his place as well for his rights as for his obligations." Article 945.

(The emphasis throughout has been supplied.)[23]

From the foregoing it is obvious that Mrs. Reese became seized of all the rights of her mother at the moment of her mother's death, one being the right to institute "all the actions" which Mrs. Franzheim "had the right to institute," including the suit to establish that Article XIX of the Simms will contained prohibited substitutions which, being in derogation "of laws made for the preservation of public order or good morals,"[24] are absolutely and irremediably null,[25] com-

23. The provisions of all of these articles are the same today; none were affected by the Code of Civil Procedure effective from January 1, 1961.

24. Article 11 of the Revised Civil Code provides: "Individuals can not by their conventions, derogate from the force of laws made for the preservation of public order or good morals. * * *" See, also, Article 2031, which provides, in part: "Every condition * * * prohibited by law is null, and renders void the agreement which depends on it." (The emphasis has been supplied.)

25. Article 12 of the Revised Civil Code Provides "Whatever is done in contravention of a prohibitory law is void, although the nullity be not formally directed." (The emphasis has been supplied.)

pletely insusceptible of ratification by acquiescence, convention, or estoppel,[26] with the result that, to this extent, her grandmother died intestate.[27]

We now pass to the merits of the case.

In order to solve the problems posed with respect to the validity of the purported trusts sought to be established by Mrs. Simms in Article XIX of her will, we must look to the applicable law in effect at the time of the death of Mrs. Simms and that of her daughter, Mrs. Franzheim, as, unquestionably, the rights of this daughter and those of her heirs were fixed and vested at the time of their respective deaths, i. e., May 1, 1957, and December 15, 1959. First Congregational Church v. Henderson, 4 Rob. 209; Succession of Marion, 163 La. 734, 111 So. 667; Pires v. Youree, 170 La. 986, 129 So. 552; Succession of Manning, 185 La. 894, 171 So. 68; and Succession of Forstner, 186 La. 577, 173 So. 111. Consequently, the subsequent amendment to the constitution and the acts of the legislature adopted pursuant thereto[28] can have no effect whatsoever on these vested rights,[29] Section 16 of

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26. Articles 11, 12 and 2031 of the code, as quoted in full in Footnotes Nos. 24 and 25. See, also Hoggatt v. Gibbs, 12 La. Ann. 770 and 15 La. Ann. 700; Succession of LeBlanc, 128 La. 1055, 55 So. 672; Whitney National Bank of New Orleans v. Schwob, 203 La. 176, 13 So. 2d 732; and Fried v. Bradley, 219 La. 59, 52 So. 2d 247.

27. Article 1096 of the Revised Civil Code provides: "A succession is called intestate when the deceased left no will, or when his will has been revoked or annulled * * *." (The emphasis has been supplied.)

28. Article IV, Section 16 of the constitution was amended in 1958 (Act 548) and 1962 (Act 521). The 1958 changes dealt with rights of adoptive children, not pertinent here. The implementing act under the 1962 constitutional amendment to Act 44 of 1962, commonly known as the Trust Code.

29. Section 15 of Article IV of the Constitution of 1921 provides: "No ex-post facto law, nor any law impairing the obligation of contracts, shall be passed; nor shall vested rights be divested * * * ." (The emphasis is supplied.)

Article IV of the Constitution of 1921, as amended in 1952, being the provisions controlling here. The pertinent portion of this section provides:

> "No law shall be passed abolishing forced heirship * * *. **No law shall be passed authorizing the creation of substitutions, fidei commissions or trust estates**; except that the legislature **may** authorize the creation of **trust estates** for a period not exceeding ten years from the settler's death as to a beneficiary which is not a natural person. Ten years from the settler's death as to a beneficiary who is a natural person, or until the death of the beneficiary whichever is the longer period. * * *." (The emphasis has been supplied.)

This constitutional provision is but a reiteration of the absolute prohibition against substitutions and fidei commissa that has existed since Louisiana became a state, and which is codified in Article 1520 of the Revised Civil Code, the pertinent portion of which provides: "**Substitutions and fidei commissa are and remain prohibited. Every disposition by which the donee**, the heir, or **legatee is charged to preserve for or**[30] **to return a thing to a third person is null**, even with regard to the donee, the instituted heir or the legatee." (The emphasis has been supplied.)

In Succession of Reilly, 136 La. 347, 67 So. 27, with the late Chief Justice Charles A. O'Niell as the author of the opinion, the court gives a short, but full and complete, crystallization of the jurisprudence of this state on prohibited substitutions and fidei commissa as reprobated in these constitutional and codal provisions, pointing out:

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30. The editors of the Louisiana Legal Archives advise that the word "or" as used in this article should have been translated "and."

"In more than a century of jurisprudence on the subject of substitutions and fidei commissa, prohibited by Article 1520 of the Civil Code, the distinction between them and the difference in their effect has been consistently observed. The essential elements of the prohibited substitution are that the immediate donee is obliged to keep the title of the legacy inalienable during his lifetime, to be transmitted at his death to a third person designated by the original donor or testator. Such a disposition is null even with regard to the original donee or legatee. In the fidei commissum, whereby the donee or legatee is invested with the title and charged or directed to convey it to another person or to make a particular disposition of it, only the charge or direction, as to the ultimate disposition of the donation or legacy, is null and is to be considered not written, leaving the donation or bequest valid as to the donee or legatee. **A substitution is an attempt on the part of the donor or testator to make a testament for his donee or legatee along with his own will, and to substitute his own will for the legal order of succession from his donee or legatee.** If permitted, the effect of a substitution would be to tie up the title and keep it out of commerce during the lifetime of the first donee, during which time neither he nor the person designated to receive the title at the donee's death could alienate it." (The emphasis has been supplied.)

In the same opinion the author observed: "A substitution is necessarily a fidei commissum, but a fidei commissum is not necessarily a substitution. In the fidei commissum the title is not tied up or kept out of commerce; the direction or charge, as to its disposition, is to be regarded only as a precatory suggestion addressed to the conscience of the donee or legatee, which, being illegal, but harmless, can have no binding effect, and may be legally regarded as not written."

In subsequent cases treating of substitutions and fidei commissa, this language has been frequently quoted with approval. And, in a later case dealing with this subject, with Chief Justice O'Niell again the author of the opinion, the court held: "**A bequest of property to one legatee** with the stipulation that on the condition that at his death and **without any act of conveyance from him it shall belong to another legatee named in the will is a prohibited substitution.**" Succession of Heft, 163 La. 467, 112 So. 301. (The emphasis has been supplied.)

It is obvious, therefore, that a prohibited substitution exists when a testator places the title of the property bequeathed in a first named legatee (referred to as the instituted heir) at his death, and directs that, at the end of a specified period, usually but not necessarily at the death of the instituted legatee, this title is to be turned over, transmitted, or passed to a second legatee (referred to as the substitute heir), with the result that both parties take their title directly from the testator, the title of the institute being one that he cannot alienate because of the charge that he is to transmit it to the substitute at some time in the future and the title of the substitute being one that the substitute cannot alienate because it does not exist until some date in the future when the property is to eventually "vest" in him. Marshall v. Pearce, 34 La. Ann. 557. In thus indicating a desire to give the property away "twice" to two named legatees, the testator, as pointed out in Succession of Reilly, supra, not only makes his own will, but attempts also to make the will of the instituted legatee, thus endeavoring to determine the law of successions by substituting "his own will for the legal order of succession from his donee or legatee."

It is to check the power of a testator to thus control the descent and distribution of his property after title has vested in the first legatee upon his death, in contravention of the laws establishing the order of inheritance, as well as to prevent restraints upon the alienation of property, that the law, **as a penalty, strikes down the entire disposition**, the second paragraph of Article 1520 clearly providing that "Every disposition by which the donee, the heir, or the legatee is charged to preserve for or return a thing to a third person **is null even with regard to the donee, the instituted heir, or the legatee.**" As pointed out in Succession of Johnson, 223 La. 1058, 67 So. 2d 591, "**in cases of prohibited substitutions the whole will is stricken with nullity**, whereas in cases of fidei commissa, it is only those dispositions which are tainted with the designation that are invalid," the vital distincting being whether the instituted legatee has under the bequest the authority to alienate the title placed in him. See, Marshall v. Pearce, supra. (The emphasis has been supplied.)

It must be remembered that under the law in existence at the time of the death of Mrs. Simms, and that of her daughter, Mrs. Franzheim, **the only exceptions to the reprobations against the disposition of property under Article 1520** of the Revised Civil Code pertinent here[31] were to be found in (1) Article 1522, which permits a testator to separate the usufruct from the ownership by making a disposition in which "the usufruct is given to one, and the naked ownership to another," and (2) the trust estate law passed pursuant to Section 16 of Article IV of the constitution, which permits a testator to separate a beneficial interest from the ownership

31. In Article 1521 it is specifically stated that a disposition whereby a third person is called to take the legacy in the event the original legatee does not take it, is not a substitution.

for a limited period,[32] the distinction between this and the usufruct under Article 1522 being that a trustee, not the beneficiary, administers the property during this period.

The legislature, in authorizing the creation of private testamentary trusts under this constitutional mandate, has always done so within the specific guide lines laid down therein, as amended from time to time, and from the time of the adoption of the first legislation on this subject following the constitutional authorization (Act 81 of 1938)[33] this court, seeking to give full effect to the intention of the testator in every will containing a trust has been careful to maintain those that could be brought within these limitations if possible, but striking down those that did not comply with these provisions.

Despite criticism levelled by some legal writers at the decisions in Succession of Guillory, 232 La. 213, 94 So. 2d 38, rendered by this court, and in Succession of Meadors, 135 So. 2d 679, rendered by the Court of Appeal for the Second Circuit, certiorari denied by us, based on the fear that these decisions evidence an attitude on the part of the court to consider all trusts as containing prohibited substitutions, a mere reading of these decisions will readily disclose each involved wills in which the testator first bequeathed the property to

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32. "Usufruct is the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility and advantages which it may produce * * *." (Article 533), whereas the one to whom beneficial interests are given under the provisions of the trust estate law has only such as are stipulated by the settlor. "The right of the usufruct expires at the death of the usufructuary." (Article 606), whereas the beneficial interests go to the beneficiary during the period stipulated by the settlor only, provided this is within the period permitted by the law. The usufructuary controls and administers the property, whereas the beneficiary does not, this being the function of the trustee under the trust estate law.

33. Although Louisiana first authorized private testamentary trusts by Act 107 of 1920, this was adopted prior to the 1921 constitution. The 1920 act was specifically repealed by Act 7 of the Third Extra Session of 1935. The controlling legislation here is Act 81 of 1938.

named trustees to hold until the death of the beneficiaries, when the second bequest of the property to a third person and/or institution would take place. In other words, title to the property did not vest in the principal legatees until the trusts terminated, at which time there was a second transfer—a second vesting—of title, referred to by one writer as the "hallmark of the prohibited substitution." Since there was no vesting of the property in the principal legatee at the testator's death, only **in future**, the fact that it was stipulated in the will the property was bequeathed to the trustee "in trust" contained no magic formula to cure this obvious substitution.[34]

Had the trust estate law been interpreted as permitting such a disposition, then it would have been unconstitutional, for Section 16 of Article IV of the constitution provides "No law shall be passed authorizing the creation of substitutions," and a substitution is a "disposition by which the donee, the heir, or legatee is charged to preserve for or return a thing to a third person." Article 1520. To have made a valid disposition in compliance with existing law in the Guillory and Meadors cases, the testator should have left the property at death to the one intended as the principal legatee, subject to the conditions of the trust for the beneficiary under the administration of the trustee.

The will in the instant case readily discloses Article XIX is in direct contravention of Section 16 of Article IV of the

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34. Since the Guillory will contained such an obvious substitution, it is difficult for the author of the instant opinion (who also wrote the opinion in the Guillory case) to understand how able counsel can find solace in some of the criticisms touching thereon. Having reached the primary conclusion this was a prohibited substitution pure and simple, it was unnecessary to consider other grounds on which the bequest might also have been invalid.

constitution, as amended through 1952; the trust estate law of 1938, as incorporated with amendments in the Revised Statutes of 1950, Articles 9:1701-2212; and Article 1520 of the Revised Civil Code, our basic and statutory law in effect at the time the Simms will was executed, and also at the time Mrs. Simms died in 1957, as well as the jurisprudence thereunder.

In Paragraph (A) of Article XIX of her will, Mrs. Simms did "give, devise and bequeath" (vest title) half of the remainder of her property in this state "to Bessie Franzheim, Kenneth Franzheim II, Alden X. Boddeker, Henry C. Riquelmy and W. P. Hamblen and their successors," trustees under the testamentary trust established for Mrs. McCullar (the devise and bequest of the other half in Paragraph (B) being by identical language to the named trustees of the testamentary trust for Mr. Franzheim), to **"be held by them" "during the natural life of my * * * granddaughter,"** and at her death, the property was then to vest in her great-grandchildren in the designated proportions. This unquestionably constitutes a substitution prohibited by law, as the title to the property was not to vest in the great-grandchildren when Mrs. Simms died, but, instead, **in future**, at the time the grandchildren died, called by the appellate court in its decision "a classic example of a substitution reprobated by Louisiana law." There can be no other conclusion from the plain language of this disposition but that **Mrs. Simms bequeathed the remainder of her Louisiana properties to the trustees of Mrs. McCullar and Mr. Franzheim to hold until the deaths of these grandchildren, at which time the properties were to vest in the great-grandchildren.** This brings the disposition squarely within the defi-

nition set out in the second paragraph of Article 1520. (The emphasis has been supplied.)

Moreover, Mrs. Simms attempted in Article XIX to reach her hand beyond the grave to direct the descent and distribution of the remainder of her Louisiana property to and through this third generation, for she provided that title to these properties which vested in the great-grandchildren at the death of Mrs. McCullar and Mr. Franzheim would, if at that time the child was under 21, pass to and become the properties of the trustees of the child under the successive secondary trusts she also created in the will, the property, after passing to these trustees, not to be retransferred to these great-grandchildren until these secondary trusts terminated.

The provisions of Paragraph (C) of Article XIX make this very clear, and Paragraphs (A) and (B) specifically provide that **title is only to vest in the great-grandchildren "subject to the provisions of Paragraph (C)."** These provisions are: "In the event that **at the time of the vesting of such properties in my said great-grandchildren**, any of **my said great-grandchildren** named herein **should be under the age of twenty-one** (21) years, **then** and in that event **the properties * * * shall pass to and become the properties of the Trustees of such great-grandchildren under the trusts** which I have heretofore created and **which I now create.**" (The emphasis has been supplied.)

In the first place, it is apt to observe here that many of the conditions under which the grandchildren and great-grandchildren are to succeed to the interests bequeathed them in the will are contained in the inter vivos trusts established by Mrs. Simms in 1954, and which she makes a part of her

will by reference only, although they are intended to affect and relate to the disposition mortis causa of the property. Under the jurisprudence of this state **this invalidated the entire will.** Succession of Ledet, 170 La. 449, 128 So. 273; and Hessmer v. Edenborn, 196 La. 575, 100 So. 647. As stated in the latter case, with the late Justice Odom as the organ of the court: " * * * **where a testator refers to another writing for the purpose of manifesting the substance of his wish or desire, and where that wish cannot be ascertained without referring to such writing, then the testament * * * is invalid.**" (The emphasis has been supplied.)

We are not unmindful of the fact that under the provisions of Articles 10, 491, and 1596 of the Revised Civil Code testaments are effective in this state where, as stated in the latter article, they are "clothed with all **the formalities** prescribed for the validity of wills" where they were executed. But these articles have reference to matters of form that neither affect nor relate to the disposition of the property. In any event, and without resort to the documents which Mrs. Simms sought to incorporate in her will by reference alone, it is clear that Article XIX in itself contains a prohibited substitution pure and simple.

In argument, orally and in brief, counsel representing the relators contend Article XIX contains no prohibited substitution, but, instead, that the Louisiana property vested immediately in the great-grandchildren at the death of Mrs. Simms, with Mrs. McCullar and Mr. Franzheim "income beneficiaries" having rights in the nature of a species of usufruct. Counsel are in error.

In the first place, as just demonstrated, Mrs. Simms did not vest the property at her death in the great-grandchildren. Secondly, it is obvious that under the disposition in Article XIX neither Mrs. McCullar nor Mr. Franzheim were "income beneficiaries" as that term is defined in R. S. 9:1792 (5), for that section of the trust estate law defines an income beneficiary as "the beneficiary to whom **income is presently or currently payable, or for whom it is accumulated,** or **who is entitled to the beneficial use of the principal presently and for a time prior to its distribution.**" Under the provisions of Article XIX no income from the Louisiana property is presently or currently payable to Mrs. McCullar or Mr. Franzheim, and none is being accumulated for them. Indeed, they cannot demand any portion of the income from the trustees or even ask them for an accounting. Under these provisions neither Mrs. McCullar nor Mr. Franzheim will ever be entitled to the use of the principal, either presently or for any time prior to its distribution, (The emphasis is supplied.)

Finally, there is clearly no merit to the contention urged in the application for a writ filed by Dr. Benjamin F. Kitchen, Jr., on behalf of his minor son Benjamin that the conclusion we have reached on the merits has the effect of abridging his son's constitutionally guaranteed rights of equal protection under the Fourteenth Amendment to the Constitution of the United States, and the privileges and immunities guaranteed in Section 2 of Article IV thereof. The authorities relied on by counsel do not support this contention.

For the reasons assigned, the judgment of the Court of Appeal for the Fourth Circuit, affirming the judgment of the district court, is affirmed.

ON REHEARING

SUCCESSION of LILLIE WEIR SIMMS, Widow of EDWARD F. SIMMS

Nos. 47,706
47,707
47,713
CONSOLIDATED.

McCALEB, J., Concurring.

Heretofore, I thought the peremptory exception of no right of action well founded as plaintiff had not been called to the succession of Mrs. Franzheim by operation of law as provided by Article 940 of the Civil Code. The reason why the maxim, le mort saisit le vif, was inapplicable here (so I supposed) was because Mrs. Franzheim's succession vested in her testamentary heirs, Kenneth Franzheim II and Mrs. McCullar (as well as her executors) under Article 940 and the only right plaintiff had, at that time as a forced heir, was to sue for a reduction of the excessive donation as prescribed by Articles 1502 and 1504 of the Code. Article 1502 states that "Any disposal of property, whether inter vivos or mortis causa, exceeding the quantum of which a person may legally dispose to the prejudice of the forced heirs, **is not null**, but only reducible to that quantum." Emphasis mine.

This Court has had to construe the effect of Codal Articles 1502, 1504 and prescriptive Article 3542 in connection with the apparent conflicts arising from a reading of

Articles 940, 941 and 1607 and 1608. And, ever since the decision on rehearing in Cox vs. Ahlefeldt, 105 La. 543, 30 So. 175, it has been consistently held that the forced heir, who has not been called to the succession, does not become vested by operation of law with seizin of his legitime. His only remedy is to sue for reduction of the excessive donation since the testamentary heirs are vested with the succession until such time as the forced heir is judicially recognized. See Succession of Smith, 182 La. 389, 162 So. 21, where most of the applicable cases are cited and discussed, and Draper vs. Van Leer, 197 La. 259, 1 So. (2d) 513.

However, I now find that, while it is true that plaintiff was not vested with her mother's succession to the extent of her legitime at the time she filed this suit, she has acquired seizin during the pendency of the litigation and prior to the time the testamentary executors of the Succession of Simms filed the peremptory exception of no right of action in this Court. According to the record, it appears that on December 23, 1964 there was a judgment of probate on a rule to show cause rendered by the Twenty-Fifth Judicial District Court in the ancillary Succession of Mrs. Franzheim. This judgment, inter alia, recognizes Mrs. Reese as a forced heir of the decedent with respect to immovable property in Louisiana and orders that the testamentary dispositions be reduced to the extent that it impinges on her legitime.

Under this judgment, Mrs. Reese became vested with seizin of the succession by operation of law to the extent of her legitime and the fact that the succession's executors also had seizin is immaterial. For the maxim, le mort saisit le vif, is a rule of our jurprudence, and the seizin of executors or

administrators is a fiction of law which does not prevent that of the heir. Succession of Dupuy, 4 La. Ann. 570; State vs. Brown, 32 La. Ann. 1020 and Tulane University vs. Board of Assessors, 115 La. 1025, 40 So. 445.

Accordingly, plaintiff is vested with all rights of her mother. See Article 943 of the Civil Code. This, of course, includes her mother's right to assail the dispositions of Mrs. Simms' will which are alleged to be prohibitive substitutions as Mrs. Franzheim would not be estopped by the acceptance of her mother's succession and the ex parte judgment of possession, *from thereafter attacking those dispositions as absolute nullities.*

The exception of no right of action is, therefore, properly overruled but the reasons given in the prevailing opinion for its action are not sound in my estimation. Indeed, none of the codal articles (871, 884, 886, 902, 940, 941, 944, 945 and 1607) cited in support of the conclusion " * * * that Mrs. Reese became seized of all the rights of her mother at the moment of her mother's death, * * * " control the situation at bar because, as I have hereinbefore pointed out, plaintiff was not an heir called by operation of law to her mother's succession. For her mother had in effect (although unenforceably) disinherited plaintiff by disposing of her entire estate, mortis causa, to plaintiff's brother and sister. As aforesaid, this disposition, according to Article 1502, **is not null** but only reducible by action brought within the time prescribed by law.

On the merits, I am in agreement with the majority view and, hence, concur in the decree.

SUPREME COURT OF LOUISIANA

SUCCESSION

of

LILLIE WEIR SIMMS,

Widow of

EDWARD F. SIMMS

Nos. 47,706
47,707
47,712
47,713
(CONSOLIDATED)

HAMLIN, Justice (*Concurring in part and dissenting in part*):

I was the organ of this Court in the case of National Surety Corporation vs. Standard Accident Insurance Co., 247 La. 905, 175 So. 2d 263. Therein I stated:

> "In the light of the above jurisprudence and law, statutory and otherwise, we approach a solution of the instant matter, having in mind the present philosophy that lawsuits should be decided on their merits and should not turn on arbitrary or technical rules of procedure. Page XIII, Report of the Louisiana Law Institute to accompany the Projet of the Proposed Louisiana Code of Civil Procedure.'"[1]

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1. "7. The Report further states: '• • •

"'The procedural philosophy of the proposed new code is reflected in a number of its articles. While differently phrased, all of these provisions are based on the simple premise that lawsuits should be decided on their merits, and should not turn on arbitrary or technical rules of procedure. Perhaps this procedural philosophy is summarized by Article 5051 of the proposed new code, recommended for adoption as a perpetual reminder to the courts:

"'The articles of this Code are to be construed liberally, and with due regard for the fact that rules of procedure implement the substantive law and are not an end in themselves.'"

I voted for a rehearing in this matter because of the foregoing, believing that the same result as reached on original hearing would have been reached had this case been considered on its merits. All parties apparently desire a disposition of this case on the merits.

I will now proceed to discuss the merits.

Article XIX of the will of Mrs. Simms, which is involved in this litigation, is quoted in the majority opinion; therefore, there is no necessity for repetition here.

I find the following elements in Article XIX, which convince me that it has created a valid Trust:

1. There is a bequest "in Trust" to the named Trustees to be held and administered by them with broad discretionary powers.

2. The properties bequeathed to them as such Trustees shall be held by them **for the legatees**, the great-grandchildren of Mrs. Simms. The Louisiana property vested immediately in the great-grandchildren on the death of Mrs. Simms, subject, of course, to the Trust.

3. The duration of the Trust is during the natural life of Mrs. McCullar (A) and Mr. Franzheim II (B) if they survive Mrs. Simms.

4. Sub-division (C) creates a Trust by a bequest in Trust to the Trustees for the benefit of the minor great-grandchildren of Mrs. Simms, **her legatees.**

Mrs. Reese is not even mentioned in Article XIX. She is a stranger to the will and to the Succession of Mrs. Simms.

Mrs. Franzheim herself provided nothing extra for Mrs.

Reese, her daughter; Mrs. Reese received only her legitime as a forced heir of her mother.

Mrs. Simms intended to provide for her great-grandchildren as legatees. She used the word "bequeathed" in the last sentence of Article XIX.

Mrs. Simms' will is dated January 3, 1957; she died May 1, 1957. On July 21, 1958, by ex parte judgment, Mrs. Franzheim, Mrs. Simms' daughter, and the Trustees were placed in possession of the property. Mrs. Franzheim was cognizant of her mother's intent to provide for her great-grandchildren as legatees and abided by it. Mrs. Franzheim died December 15, 1959; her will was ordered probated in Louisiana on January 20, 1965, after litigation in Texas.

The laws and Constitutional mandate in effect at the time of the deaths of Mrs. Simms and Mrs. Franzheim were these:

Louisiana Constitution of 1921, Art. IV, Sec. 16 (As amended by Acts of 1952, No. 208), provided:

> " * * * No law shall be passed authorizing the creation of substitutions, fidei commissas or trusts estates; except that the legislature may authorize the creation of trust estates for a period not exceeding ten years from the settlor's death as to a beneficiary which is not a natural person; Ten years from the settlor's death as to a beneficiary who is a natural person **or until the death of the beneficiary whichever is the longer period**; and provided further that this prohibition as to trust estates or fidei commissas shall not apply to donations strictly for educational, charitable, religious purposes or trusts created by employers for the benefit of their employees. * * * " (Emphasis mine.)

Act 209 of 1952, Section 2, provided:

"Section 1811 of Title 9 of the Louisiana Revised Statutes of 1950 is hereby amended and re-enacted to read as follows:

"1811: General Rule

"A trust shall be created when a person (as that term is defined in R. S. 1792 (8) in compliance with the provisions of this Chapter transfers the legal title to property to a trustee in trust for the benefit of himself or a third person."

Act 81 of 1938 (Trust Estates Law of 1938), Title 2, Chapter 1, Section 5, provided:

"A trust shall be created when a person in compliance with the provisions of this Act transfers the legal title to property to a trustee in trust for the benefit of himself or a third person." (This Section became Title 9:1811 of the Louisiana Revised Statutes.)

It is my opinion, after protracted study of the law and Constitutional provision in effect at the time of the deaths of Mrs. Simms and Mrs. Franzheim in their relation to Mrs. Simms' will, that the will of Mrs. Simms does not contain a prohibited substitution.

The Louisiana State Law Institute in a report of May 1, 1964, to the Governor and Members of the Legislature, to accompany the Proposed Louisiana Trust Code (which permits prohibited substitutions), correctly stated that the constituent characteristics of a prohibited substitution are as follows:

"1. A double liberality, or a double disposition in full ownership, of the same thing to persons called to receive it, one after the other;

"2. A charge to preserve and transmit, imposed on the first beneficiary for the benefit of the second beneficiary;

"3. Establishment of a successive order that causes the substituted property to leave the inheritance of the burdened beneficiary and enter into the patrimony of the substituted beneficiary."

The Trust under Article XIX of Mrs. Simms' will contains no double liberality. The Trustees are to hold the testator's property in trust for the great-grandchildren. There is no double disposition in full ownership; full ownership is bequeathed to the great-grandchildren not after another legatee owns the property but after it is held by the Trustees for an enumerated period.

Mrs. Simms in her will spoke of Mrs. McCullar and Mr. Franzheim II as beneficiaries, but no charge is imposed on them. They have no duties and can demand nothing under the will. Anything that they might receive is at the pleasure of the Trustees. They cannot, under any stretch of the imagination, be classed as true income beneficiaries. In truth and in fact, they are beneficiaries under inter vivos Trusts which are mentioned in Mrs. Simms' will. These Trusts, except insofar as the Trustees are designated, are not a part of Mrs. Simms' will.

The fact that Mrs. Simms stated that the instant properties would be held by the Trustees during the lives of Mrs.

McCullar and Mr. Franzheim II (she could have stated a definite period of time) did not establish a successive order. According to the will, no property ever entered or left Mrs. McCullar's and Mr. Franzheim II's inheritances and thereafter entered the patrimony of the great-grandchildren.

The further fact that Mrs. Simms stated in her will that if any of her great-grandchildren were not twenty-one years of age at the time they were to be vested with her property such property would pass and become the properties of the Trustees mentioned in other inter vivos trusts does not destroy nor do away with the ownership of the great-grandchildren. There are no substituted beneficiaries.

Mrs. Simms' intention to vest her great-grandchildren with the ownership of the described properties is express and clear. The reference to Trustees enumerated in inter vivos trusts (some reference having to be made to such trusts) does not make the manifestation of Mrs. Simms' wish, intention and desire less clear in her will.

I, therefore, believe that the instant Trust is valid and should have been so considered on the merits.

I respectfully concur in that part of the majority opinion which overrules the exception of no right of action, as well as the other exceptions filed in limine. I concur only for the reasons herein set forth.

I respectfully dissent from that part of the majority opinion which invalidates the Trust created in Article XIX of Mrs. Simms' will.

SUPREME COURT OF LOUISIANA

SUCCESSION OF SIMMS

No. 47,706

SANDERS, Justice (dissenting).

Before us is the last will of Mrs. Lillie Weir Simms, who died in Houston, Texas, on May 1, 1957. Condensed to its essentials, the will leaves the testator's residuary estate "in trust to [named trustees] . . . to be held and administered by them . . . for and during the natural life of my said granddaughter [who is designated as income beneficiary] . . . and after her death . . . said properties shall pass to my great-grandchildren [named in the will]. . . ."

The question presented is whether this disposition is a prohibited substitution[1] or a valid trust[2] under Louisiana law.

Holding that the disposition is a prohibited substitution, the majority has struck down the will. I disagree.

Under a well-established rule, the court must construe the will so as to maintain its validity, if it can reasonably do so. Thus, if the will is equally susceptible of two interpretations, the court is constrained to adopt the one that saves the life of the will. LSA-C.C. Arts. 1712, 1713; Girven v. Miller, 219 La. 252, 52 So. 2d 843; Succession of Feitel, 176 La. 543, 146 So. 145; Swart v. Lane, 160 La. 217, 106 So. 833; Lelong v. Succession of Lelong, La. App., 164 So. 2d 671.

To constitute a prohibited substitution, the testator must have made a **double** disposition of the same property in **full**

1. Art. IV, Section 16, Louisiana Constitution; Art. 1520, Louisiana Civil Code.

2. Act 81 of 1938, known as the Trust Estates Law of 1938 (formerly R.S. 9:1791-2212) applies to this will.

ownership to successive legatees. LSA-C.C. Art. 1520; Succession of Thilborger, 234 La. 810, 101 So. 2d 678; Succession of Fertel, 208 La. 614, 23 So. 2d 234; Tucker, Substitutions, 24 Louisiana Law Review 439, 490-491.

Perfect ownership gives the right to use, to enjoy, and to dispose of property in the most unlimited manner. LSA-C.C. Art. 491; Giroir v. Dumesnil, 248 La. 1037, 184 So. 2d 1. As we said in Giroir v. Dumesnil:

> "Perfect ownership gives the right to use, to enjoy, and to dispose of property to the exclusion of others. . . . Such ownership consists of three elements united in the same person: **Usus**, or the right to use; **fructus**, or the right to the fruits; and **abusus**, or the right to dispose of."

Under the will, the trustees receive the property "in trust" to be "held and administered by them." The granddaughter is income beneficiary, that is, she receives the income. The great-grandchildren are principal beneficiaries, that is, the property is to be distributed to them after the death of the income beneficiary. The will was so construed by the court in the Louisiana probate proceedings in the Succession of Lillie Weir Simms, by the judgment of possession rendered July 21, 1958.

When the will is thus properly construed, the tenure of the trustees is not one of full ownership within the definition of prohibited substitution. Moreover, such a trust has full sanction in the Trust Estates Law of 1938.

For the reasons assigned, I respectfully dissent.

APPENDIX D

SUCCESSION OF	•	NO. 1584
LILLIE WEIR SIMMS,	•	COURT OF APPEAL
Widow of	•	FOURTH CIRCUIT
EDWARD F. SIMMS	•	STATE OF LOUISIANA

* * *

APPEAL FROM THE TWENTY-FIFTH JUDICIAL DISTRICT COURT FOR THE PARISH OF PLAQUEMINES, NO. 4270, HON. RUDOLPH M. McBRIDE, JUDGE

* * *

GODFREY Z. REGAN
JUDGE

* * *

(Court composed of Judges Godfrey Z. Regan, Paul E. Chasez, and Luther E. Hall.)

MILLING, SAAL, SAUNDERS, BENSON & WOODWARD,
EUGENE D. SAUNDERS,
LAWRENCE K. BENSON,
GUY C. LYMAN, JR.,
For Alden X. Boddeker, and Henry C. Riquelmy, Defendants-Appellants.

LEONARD OPPENHEIM,
For William P. Hamblen, and Leclare Ratterree, Jr., Undertutor, and Lillie Franzheim McCullar, Only as Natural Tutrix of Her Minor Children, Lillie Celeste McAshan, Kenneth Alexander McAshan, Elizabeth Simms McAshan and Michael M. McCullar, Appellants.

H. ALVA BRUMFIELD,
SYLVIA ROBERTS,
For Dr. Benjamin F. Kitchen, Jr., Tutor of the Minor, Benjamin F. Kitchen, III, Appellant

PHELPS, DUNBAR, MARKS, CLAVERIE & SIMS,
SUMTER D. MARKS, JR.,
LOUIS B. CLAVERIE,
For Kenneth Franzheim, II, Appellant

SIDNEY WRIGHT,
629 Texas National Bank Bldg.
Houston, Texas
COBB & WRIGHT,
MORRIS WRIGHT,
JOSEPH V. FERGUSON, II,
For Mrs. Elizabeth Reese, Appellee

CHAFFE, MCCALL, PHILLIPS, BURKE, TOLER & HOPKINS,
JOHN L. TOLER,
E. HAROLD SAER, JR.,
For Lillie Weir Franzheim McCullar, Appearing Only in Her Capacity as Provisional Administratrix of the Succession of Bessie Simms Franzheim, Defendant-Appellee.

CHAFFE, MCCALL, PHILLIPS, BURKE, TOLER & HOPKINS,
JOHN L. TOLER,
E. HAROLD SAER, JR.,
For Lillie Weir Franzheim McCullar, Only in Her Individual Capacity, Defendant-Appellee.

MONTGOMERY, BARNETT, BROWN & READ,
WOOD BROWN,
For Kenneth Franzheim, II, Individually, Appellee

CHESTER A. EGGLESTON,
Port Sulphur, Louisiana
Curator ad hoc for the Minors: Benjamin K. Kitchen, III, Edward F. Kitchen, Elizabeth F. Kitchen,
Attorney for Philip Masquelette, Under-tutor of the above minors.

AFFIRMED

Plaintiff, Mrs. Elizabeth Franzheim Reese, instituted this suit on November 27, 1961, endeavoring (a) to annul various trust provisions contained in the will of her late grandmother, Mrs. Lilly Weir Simms, (b) to nullify probate of the will to the extent of its invalidity, (c) and to cancel the judgment of possession rendered on July 21, 1958, in the Louisiana proceedings ancillary to her grandmother's Texas estate.

The defendants and the respective capacities in which they were sued herein are: (1) Kenneth Franzheim, II, the plaintiff's brother and a beneficiary under one of the contested trusts, individually, and in his capacity as executor of the Simms estate, and also as trustee of one of the trusts; (2) Mrs. Lilly Franzheim McCullar, the plaintiff's sister, individually, as beneficiary of one of the contested trusts, as provisional administratrix in the Succession of her mother, Mrs. Bessie Simms Franzheim, and as tutrix of her minor children, who are beneficiaries under the trusts; (3) Alden I. Boddeker, in his capacity as executor and trustee; (4) Henry C. Riquelmy, in his capacity as an executor and trustee; (5) W. P. Hamblen, in his capacity as an executor and trustee; and (6) the plaintiff's minor children, who are beneficiaries under one of the disputed trusts.

The defendants initially pleaded several exceptions which were overruled by the trial court.

The defendants then answered and denied the invalidity of Mrs. Simms' testament.

After a trial on the merits was consummated,[1] the lower court rendered a judgment in favor of the plaintiff, declaring

1. The facts hereof where stipulated by the litigants.

Mrs. Simms' testamentary trusts to be null and void. The defendants have therefore prosecuted this appeal.[2]

The record reveals that the testatrix, Mrs. Lilly Weir Simms, died on May 1, 1957, at her domicile in Houston, Texas. She was survived by one child, namely, Mrs. Bessie Simms Franzheim, the mother of the plaintiff, Mrs. Elizabeth Franzheim Reese, and of Kenneth Franzheim, II, and Lilly Franzheim McCullar, both of whom are defendants herein. Mrs. Franzheim, who was also domiciled in Texas, died on December 15, 1959, after participating in her mother's Texas and Louisiana mortuary proceedings.

Mrs. Simms' testament, which was confected on January 3, 1957, was admitted to probate in Harris County, Texas. Ancillary probate proceedings were opened in the district court for Plaquemines Parish, and on June 5, 1957, the testament was ordered registered, probated and executed with respect to the Louisiana property affected thereby. A judgment of possession in the ancillary proceeding was rendered on July 21, 1958, placing the legatees into possession of the Louisiana estate.

The testatrix, after creating certain particular legacies, bequeathed one-third of all the real estate and royalties owned by her in the State of Louisiana to her daughter, Mrs. Franzheim. The remainder of her estate was placed in two trusts, and it is this portion of her grandmother's testament which plaintiff is endeavoring to nullify.

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2. The last testament of Mrs. Lilly Weir Simms provides that if any legatee or devisee contests it or by legal procedure interferes with the handling of the estate, then that legatee or devisee shall take nothing under her will or out of her estate. For this reason, Kenneth Franzheim, II, has appealed only in his capacity as executor and trustee, and not individually. For the same reason Mrs. Lilly Franzheim McCullar has appealed only in her capacity as provisional administratrix.

The controversial article of the testament is designated by the Roman Numeral XIX, and it reads as follows:

"XIX

"All the rest, residue and remainder of my estate, real, personal and mixed, of whatsoever kind and character and wheresoever situated, I give, devise and bequeath as follows:

"(A) one-half (½) thereof in trust to Bessie Franzheim, Kenneth Franzheim II, Alden X. Boddeker, Henry C. Riquelmy and W. P. Hamblen, and their successors, the Trustees named in the LILLIE WEIR SIMMS TRUST FOR LILLIE FRANZHEIM McCULLAR, which Trust Agreement is recorded under file #69835 in Book 103 of Conv., Page —, and Book 1 of Don., Page —, et seq., in the Parish of Cameron, State of Louisiana, to be held and administered by them and the income from which shall be invested or distributed at the sole discretion of said Trustees, and shall be held by said Trustees and their successors with the same rights, powers and duties as are set forth in the above named Trust Agreement, save only that the income from the properties herein bequeathed to them as such Trustees may either be invested by them or distributed to the beneficiary, at their sole discretion, and said beneficiary shall not have the right to demand any distribution to her should the Trustees, in their sole and unlimited discretion, decide that such distribution is either unnecessary or unwise. Said properties herein bequeathed to said Trustees shall be held by them for and during the natural life of my said granddaughter, LILLIE FRANZHEIM McCULLAR, if she survives me, and after her death or my death, whichever occurs last, said properties shall pass to my great-grandchildren LILLIE CELESTE McASHAN, KENNETH ALEXANDER McASHAN, ELIZABETH SIMMS Mc-

ASHAN and MICHAEL M. McCULLAR, share and share alike, subject to the provisions of Paragraph (C) hereof.

"(B) The other one-half (½) thereof in trust to Kenneth Franzheim, Bessie Franzheim, Alden X. Boddeker, Henry C. Riquelmy and W. P. Hamblen, and their successors, the Trustees named in the LILLIE WEIR SIMMS TRUST FOR KENNETH FRANZHEIM II, which trust agreement is recorded under file #69830 in Book 103 of Conv., Page —, and Book 1 of Don., Page —, et seq., in the Parish of Cameron, State of Louisiana, to be held and administered by them and the income from which shall be invested or distributed at the sole discretion of said Trustees, and shall be held by said Trustees and their successors with the same rights, powers and duties as are set forth in the above named Trust Agreement, save only that the income from the properties herein bequeathed to them as such Trustees may either be invested by them or distributed to the beneficiary, at their sole discretion, and said beneficiary shall not have the right to demand any distribution to him should the Trustees, in their sole and unlimited discretion, decide that such distribution is either unnecessary or unwise. Said properties herein bequeathed to said Trustees shall be held by them for and during the natural life of my said grandson, KENNETH FRANZHEIM II, if he survives me, and after his death or my death, whichever occurs last, said properties shall pass to my great-grandchildren, LILLIE CELESTE McASHAN, KENNETH ALEXANDER McASHAN, ELIZABETH SIMMS McASHAN, MICHAEL M. McCULLAR, BENJAMIN FORD KITCHEN III, EDWARD SIMMS KITCHEN, and ELIZABETH FRANCES KITCHEN, share and share alike, subject to the provisions of Paragraph (C) hereof.

"(C) In the event that at the time of the vesting of such properties in my said great-grandchildren, any

of my said great-grandchildren named herein should be under the age of twenty-one (21) years, then and in that event the properties herein bequeathed to such minor shall pass to and become the properties of the Trustees of such great-grandchildren under the trusts which I have heretofore created and which I now create as follows:

"(1) LILLIE WEIR SIMMS TRUST FOR LILLIE CELESTE McASHAN bearing file number 69836 and recorded in Book 103 of Conveyance and Donation Book 1, Cameron Parish, Louisiana;

"(2) LILLIE WEIR SIMMS TRUST FOR KENNETH ALEXANDER McASHAN bearing file number 69838 and recorded in Book 103 of Conveyance and Donation Book 1, Cameron Parish, Louisiana;

"(3) LILLIE WEIR SIMMS TRUST FOR ELIZABETH SIMMS McASHAN bearing file number 69834 and recorded in Book 103 of Conveyance and Donation Book 1, Cameron Parish, Louisiana;

"(4) LILLIE WEIR SIMMS TRUST FOR BENJAMIN FORD KITCHEN III, bearing file number 69834 and recorded in Book 103 of Conveyance and Donation Book 1, Cameron Parish, Louisiana;

"(5) LILLIE WEIR SIMMS TRUST FOR EDWARD SIMMS KITCHEN bearing file number 69833 and recorded in Book 103 of Conveyance and Donation Book 1, Cameron Parish, Louisiana;

"(6) LILLIE WEIR SIMMS TRUST FOR ELIZABETH FRANCES KITCHEN bearing file number 69832 and recorded in Book 103 of Conveyance and Donation Book 1, Cameron Parish, Louisiana;

"(7) As to MICHAEL M. McCULLAR, who has no trust provided for him as set out above, if at the time of the vesting of such properties in him he be under the age of twenty-one (21) years, then the share bequeathed to him shall pass to and become the properties of these Trustees: W. P. Hamblen, Alden X. Boddeker, Henry C. Riquelmy and Bessie Franzheim. Such trust shall be created for the same length of time as is provided in the trusts set out in the paragraphs numbered (1) through (6) above, so that the Trustees in this trust, if created, shall hold said properties in trust for such minor child in the same manner as is provided in the trusts above named. Said Trustees shall execute an instrument in writing recordable in the parishes in Louisiana in which my property may be situated acknowledging that they hold said property in trust, and such instrument shall set out the terms and conditions of said trust as are set forth in those six (6) trusts above referred to.

"(The trust agreements set out in Paragraphs (1) through (6) above are recorded in other parishes in Louisiana, but these references are given for the purpose of identifying the Trustees and the trust properties which shall pass in the event any of my properties shall go to any of the above named great-gradchildren under said trusts.)

"Such portion of my estate going to the Trustees of any of my said great-grandchildren under this, my Will, shall be held, managed and administered by said Trustees in the same manner, to the same extent, and with the same duties as are conferred in the Trust Agreements set out in Paragraphs (1) through (6) above, and shall be held by such Trustees

> for the same term as is set forth in such Trust Agreements, whereupon said properties herein bequeathed and the accumulations shall be paid over to my great-grandchildren."

The plaintiff insists that the foregoing portion of her grandmother's will is invalid because the trusts contained therein created prohibited substitutions contrary to Section 16, Art. IV of the Louisiana Constitution of 1921, Civil Code Art. 1520, and R.S. 9:1791; powers of appointment contrary to Civil Code Art. 1573; and incorporation by reference of non-testamentary trust agreements contrary to Civil Code Art. 1570. She also contends that the quoted residuary clause is against public policy and public order. Moreover, it is asserted that the invalidity of the residuary clause results in Mrs. Simms' having died intestate *pro tanto*, and that the intestate portion of Mrs. Simms' estate devolves upon her as one of the three children and forced heirs of her mother, who in turn was the sole child and forced heir of the testatrix.[3]

The lower court rendered judgment in plaintiff's favor and declared the trusts created in the residuary clause of Mrs. Simms' will to be null and void. Consequently, the trial judge annulled the probate of the will and the judgment of possession insofar as they were related to the testamentary trust. The court then reasoned that, the trust being invalid, the property subject thereto fell into intestacy, and that this property was inherited by the testatrix's daughter, and then in turn by her daughter's children, one of whom is the plaintiff. However, the court did not fix the exact amount of the

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3. The plaintiff is not a legatee under either her grandmother's or her mother's will, and thus must depend entirely upon her rights as forced heir.

plaintiff's inheritance, since she was also involved in litigation in which she attacked the provisions of her mother's will.

Defendants insist that the following errors exist in the judgments rendered by the lower court:

(1) In refusing to maintain the defendants' declinatory exception of lack of jurisdiction *ratione materiae* and *personae*, and their exception to the venue of the action.

(2) In concluding that the provisions of the quoted portion of Mrs. Simms' will are null and void as (a) being contrary to the laws, public policy, and public order of Louisiana, (b) containing prohibited substitutions in violation of Sec. 16, Art. IV of the Louisiana Constitution of 1921, Civil Code Art. 1520, and R.S. 9:1791, and (c) being in violation of Civil Code Art. 1573.

(3) In deciding that Louisiana's trust laws and its laws relating to substitutions and powers of appointment are applicable to the overriding royalty interests left by the decedent.

(4) In canceling, annulling, rescinding, and setting aside the probate of Mrs. Simms' will and the judgment of possession rendered on July 21, 1958, insofar as they relate to the residuary clause of said will.

(5) In concluding that Mrs. Simms died intestate as to the property encompassed by the residuary clause, and in recognizing the plaintiff, Mrs. Reese, and Mrs. Franzheim's other two children to have rights of inheritance through their mother, Mrs. Franzheim, with reference to the property covered thereby.

(6) In undertaking to decree the reinstatement of the Louisiana executors and to direct them to proceed to administer Mrs. Simms' Louisiana estate heretofore closed by judgment of possession.

RIGHT OF ACTION

Before engaging in a discussion of the foregoing errors, we must initially dispose of certain arguments advanced by counsel on this appeal relative to the absence of plaintiff's right of action to attack the provisions of her grandmother's will. In essence, counsel contends that the plaintiff is not a forced heir of her grandmother and that she can therefore inherit only such rights as her mother possessed at the time of her mother's death and in conformity with her mother's will. Counsel elucidates upon this argument by pointing out that plaintiff's mother acquiesced therein when she qualified as tutrix of Mrs. Simms' Louisiana estate and trustee of each of the trusts in dispute, and petitioned that the will be executed and that the heirs be placed in possession in conformity with the will.

In Hoggatt v. Gibbs[4] the plaintiff instituted suit in order to attack the provisions of his grandfather's will and was met by exceptions based upon his mother's acceptance and ratification of the provisions thereof. The Supreme Court maintained the plaintiff's right to sue for his lawful share, predicating its decision upon the rationale that a disposition of property reprobated by law, such as a substitution, is not susceptible of confirmation or ratification.[5] Therefore, in

4. 12 La. Ann. 70, 15 La. Ann. 700 (1860).
5. See also Anderson v. Pike, 29 La. Ann. 120, where an attack on a substitution by a third person foreign to the testament in question was sustained.

view of the foregoing conclusion we are of the opinion that the action of the plaintiff in attacking the residuary clause in question, as a prohibited substitution, is not precluded by estoppel, since her mother could not have legally acquiesced in the execution of a prohibited substitution; and if such a substitution exists in the will, it is an absolute nullity and subject to being contested by the testatrix's grandchildren.

Counsel for the defendants further contends that by virtue of the rationale of Civil Code Art. 1758 (4) there existed a natural obligation on the part of the plaintiff's mother to execute the provisions of her grandmother's will. This article reads as follows:

> "There is also a natural obligation on those who inherit an estate, either under a will or by legal inheritance, to execute the donations or other dispositions which the former owner had made, but which are defective for want of form only."

In view of the foregoing article, the defendants reason that the plaintiff is precluded from recovering as a result of the rationale emanating from Civil Code Art. 1759 (1), which provides that no suit will lie to recover what has been paid or given in compliance with a natural obligation.

In support of this conclusion, counsel points to the case of Breaux v. Breaux.[6] However, an analysis of this case reveals that it does not support the defendants' argument. In its original opinion the organ of the Supreme Court reasoned, correctly we feel, that a *fideicommissa* or substitution is a defect of substance and not of form, and therefore does not create a natural obligation under Civil Code Art. 1758 (4) to

6. 218 La. 795, 51 So.2d 73 (1950).

pay the amounts bequeathed. However, on rehearing the court in effect stated that irrespective of whether the fourth paragraph of Civil Code Art. 1758 is applicable to testamentary donations, the standard applied in the first paragraph of that article—i.e., that a natural obligation is one which the law has rendered invalid for the want of certain forms or for some reason of general policy, but which is not in itself immoral or unjust—is controlling. Thus the result reached by the court is that unless the performance of a donation or disposition is immoral or unjust, a natural obligation is created on the part of the heir to carry them out, apparently irrespective of the provisions of paragraph 4 of Art. 1758. The court then concluded that the bequest in question was a *fideicommissa* and, unlike a substitution, neither immoral nor unjust.[7]

We do not adhere to the reasoning of this decision, and we are not compelled to follow it since it very obviously does not apply to substitutions. Hence, if the rationale of the original opinion in Breaux v. Breaux is correct, the substitution allegedly created in the Simms will is a defect of substance and not form, and hence does not create a natural obligation under Civil Code Art. 1758 (4).[8] On the other hand, if the opinion on rehearing in the Breaux case is correct, the strong prohibition against substitutions[9] acknowledged therein indicates that under the first paragraph of Art. 1758 such a disposition would not create a natural obligation.

We are therefore of the opinion that the plaintiff is not precluded from prosecuting this action either by the

7. This decision as to the morality and justice of *fideicommissa* was apparently deduced from the premise that the Trust Act then in existence gave more respectability to a *fideicommissum* than existed in former times.

8. Morris v. Abney, 135 La. 302, 65 So. 315.

9. See also Succession of Le Blanc, 128 La. 1055, 55 So. 672.

acquiescence or ratification of her mother or by the inability created under our law to recover what has been paid pursuant to a natural obligation.

EXCEPTION TO THE JURISDICTION RATIONE MATERIAE

The defendants initially pleaded exceptions to the jurisdiction of the court *ratione materiae* and *ratione personae*, as well as an exception to the venue of the suit. These exceptions were overruled by the trial court; however, they have been reurged before us on appeal and therefore each exception will be discussed hereafter in the order in which we have enumerated them.

The exceptions to the jurisdiction *ratione materiae* are predicated on the fact that the succession was in effect closed by virtue of a judgment of possession signed on July 21, 1958. Apparently, as an additional basis for this exception, defendants also point out that they are domiciled in Harris County, Texas, and therefore are non-residents of Louisiana.[10]

We are of the opinion that the foregoing exception is not well founded.

The Code of Civil Procedure defines jurisdiction as the legal power and authority of a court to hear and determine an action or proceeding involving the legal relations of the parties, and to grant the relief to which they are entitled.[11]

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10. This is true of all defendants except Mrs. Lilly Franzheim McCullar.

11. Art. 1, Code of Civil Procedure.

Moreover, jurisdiction over the subject matter of an action is defined in Art. 2 thereof as follows:

> "Jurisdiction over the subject matter is the legal power and authority of a court to hear and determine a particular class of actions or proceedings, based upon the object of the demand, the amount in dispute, or the value of the right asserted."

In conformity with the rationale emanating from the foregoing article, Art. 3401 expressly and specifically confers upon Louisiana courts jurisdiction for succession purposes over property situated in Louisiana which belonged to a deceased non-resident at the time of his or her death.

Therefore, it is quite obvious that the principal requirement for jurisdiction *ratione materiae* in succession proceedings involving the property of a deceased non-resident is the location of the succession property in this state. The fact that the executors are non-residents, and that a judgment of possession may have been rendered are quite irrelevant for purposes of jurisdiction over the subject matter of this litigation.[12]

EXCEPTIONS TO THE JURISDICTION OF THE COURT RATIONE PERSONAE

The non-resident defendants[13] also pleaded an exception to the jurisdiction of the court *ratione personae*, predicated

12. It should be specifically noted that Art. 2931 of the Code of Civil Procedure gives Louisiana courts power to hear an action to annul a probated testament. This is true even if the succession representative has been discharged. Moreover, the mere fact that this is an ancillary proceeding does not change this rule, since ordinary succession procedure applies to ancillary succession proceedings. See Code of Civil Procedure Art. 3401.

13. Mrs. Lilly Franzheim McCullar is a resident of Louisiana.

upon the fact that they are domiciled in Harris County, Texas, and therefore are not amenable to Louisiana service of process.

Jurisdiction over the person is provided for in Art. 6 of the Code of Civil Procedure, which reads:

> "Jurisdiction over the person is the legal power and authority of a court to render a personal judgment against a party to an action or proceeding. This jurisdiction must be based upon:
>
> "(1) The service of process on the defendant, or on his agent for the service of process;
>
> "(2) The service of process on the attorney at law appointed by the court to defend an action or proceeding brought against an absent or incompetent defendant who is domiciled in this state; or
>
> "(3) The submission of the party to the exercise of jurisdiction over him personally by the court, or his express or implied waiver of objections thereto."

It has been emphasized in the editorial comments applicable to this article, that the concept of jurisdiction over the person was made part of the procedural law of Louisiana as one of the requirements of due process of law in the case of Pennoyer v. Neff.[14] Since the rendition of that decision, an avalanche of jurisprudence has emanated from tribunals, both high and low, in an effort to establish as guidelines, in one situation or another, the exact limitations of the doctrine enunciated therein.

In any event, the most recent rationalization upon the subject emanates from the case of McGee v. International Life

14. 95 U.S. 714 (1877).

Insurance Company,[15] wherein the organ of the court, quoting International Shoe Co. v. State of Washington,[16] stated that the test to be applied is as follows:

> ". . . 'due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice.' " Id., 326 U.S. at page 316, 66 S. Ct. at page 158."

In applying the foregoing reasoning to the facts hereof, the record reveals that the defendants voluntarily qualified as executors in the Louisiana proceedings ancillary to the Texas estate of the decedent, and processed the administration thereof to a judgment of possession. After obtaining that judgment the defendants filed a motion to fix additional inheritance taxes, a motion to cancel a surety bond, and an application for authority to sign an extention of a mortgage note and a mortgage and pledge which they had executed together with other parties on July 25, 1958, which, to reiterate for the purpose of emphasis, was after the judgment of possession. Shortly before this suit was instituted, they filed a petition to withdraw the application for authority to sign the extension of the mortgage and pledge, and in this petition they designated themselves as former executors and declared that they had become *functus officio* by virture of the judgment of possession.

Under Art. 2931 of the Code of Civil Procedure the proper parties defendant in an action to annul a probated

15. 355 U.S. 220 (1957).
16. 326 U.S. 310 (1945).

testament are the legatees, the residuary heir, if any, and the executor, if he has not been discharged. Therefore, one of the many questions posed for our consideration herein is whether the defendants, as executors and legatees, have, in fact, possessed the minimum contacts with the State of Louisiana so as not to offend the traditional notions of fair play and substantial justice.[17]

A laborious analysis of the foregoing facts is unnecessary in view of the rationale emanating from the McGee case. Therein, the defendant corporation did little more than write a policy of insurance, and this served as sufficient contact with the state to subject it to the process thereof.

In this case, the defendants have qualified as executors in the ancillary proceeding to administer Louisiana property in conformity with Louisiana law. Moreover, those of the defendants who are heirs claim property rights under the decedent's will to Louisiana property. Under these circumstances, it is clear that the defendants possess the minimum contacts necessary to satisfy the requirements of due process of law in the area of jurisdiction *ratione personae.*

Therefore, we are of the opinion that the lower court ruled correctly in dismissing the defendants' exceptions to the jurisdiction *ratione personae.*

VENUE

The defendants filed declinatory exceptions to the venue

17. It is reasonable in our opinion that the mere qualification as an executor in an ancillary proceeding of itself subjects a person in his official capacity to the process of the ancillary state. See Atkinson v. Rogers, 14 La. Ann. 633; Hargrave v. Turner Lumber Co., 194 La. 285, 193 So. 648.

of this suit predicated upon the fact that certain immovable property, royalties, oil, gas, and mineral rights or leases bearing upon other immovable property are all located outside of the Parish of Plaquemines.

It is relatively significant to note that the defendants themselves chose the District Court of Plaquemines Parish as the proper place to institute these ancillary probate proceedings, and the plaintiff was forced by virtue of the provisions of Art. 2931 of the Code of Civil Procedure to file the action to annul the will in the same proceeding. Thus, the defendants occupy the paradoxical position of attacking the validity of their own choice of venue. However, since the venue provisions relating to succession proceedings promulgated in Art. 2811 of the Code of Civil Procedure are mandatory and may not be waived,[18] the defendants' objections thereto nevertheless must be considered by this court.

Articles 2811 and 3401 of the Code of Civil Procedure provide that the proper venue for successions of decedents not domiciled in this state is any parish where immovable property of the deceased is situated or, in the absence of immovables, where his movable property is located. In this case the decedent owned a relatively small amount of immovable property in St. Martin Parish, and the only property owned by her in Plaquemines Parish consists of certain overriding royalties derived from mineral leases bearing upon Plaquemines immovables. Consequently, defendants argue that the overriding royalty interests of the decedent are movables, and that the proper venue under Art. 2811 of the Code of Civil

18. Art. 44, Code of Civil Procedure.

Procedure is St. Martin Parish, where the decedent's immovable property is located.

The vexatious question of the classification or characterization of overriding royalties as movable or immovable property must be decided by us in order to determine the propriety of the venue of the plaintiff's action. Even more important, however, the question arises again hereinafter for the purpose of deciding whether the law of Texas or the law of Louisiana is applicable so as to determine the validity of Mrs. Simms' testament.

At this point suffice it to say that, as will be explained in detail later, the provisions of Louisiana law leave little if any doubt of the proper characterization of the decedent's overriding royalties for succession purposes as immovable property. Consequently, we are of the opinion that the lower court reasoned correctly in overruling the defendants' exceptions to the venue of this suit.

ON THE MERITS

At the inception of this opinion relative to the merits hereof, we emphasize that there is no substantial dispute over the validity of the form of the will.[19] Under the Uniform Wills Law[20] a foreign will confected in conformity with the formal requisites of the state where executed or the state of the testator's domicile shall have the same force and effect in Louisiana, provided it is in writing and subscribed by the testator. The litigants herein all concede that the will which

19. The plaintiff does contend that certain portions of the will are invalid because they incorporate by reference the provisions of extraneous *inter vivos* trusts.

20. R.S. 9:2401.

forms the subject matter of this dispute meets the formal requisites of Texas law.

It is also conceded that Mrs. Simms' testament conforms to the substantive requisites of Texas law. The essence of the controversy herein revolves around the question of whether the will conforms to the law of Louisiana insofar as it effects the property situated therein.

Before this question can or should be resolved, however, we must initially decide whether Texas or Louisiana law applies in judging the validity *vel non* of the testament. If its validity in Louisiana hinges upon the provisions of Texas law, the plaintiff's suit necessarily must fail. On the other hand, if Louisiana law is applicable, we must then consider the arguments propounded by the plaintiff in her attack upon the validity of the will.

It is a well settled rule relating to conflicts of law that movable property located outside the state of the decedent's domicile is transferred in conformity with the law of his state. On the other hand, it is equally well settled that immovable property is distributed in accordance with the law of the state in which the property is located.[21] Hence, there is no question in this case that the fee land located in St. Martin Parish descends in conformity with Louisiana law.

The difficulty arises in the choice of law applicable when the decedent's property is of such a nature as to require its characterization as movable or immovable. In Louisiana, this

21. Civil Code Art. 10; Succession of Fisher, 235 La. 263, 103 So.2d 276; Succession of Martin, 147 So.2d 53.

difficulty is compounded by the fact that incorporeal things may also be characterized as either movable or immovable.[22]

In the present controversy counsel for the defendants argue that the overriding royalty interests involved herein, which incidentally are the most valuable properties affected by this dispute, are in reality "personal" property since leasehold interests in minerals have been classed as personal property by the Louisiana Supreme Court[23] despite the existence of three separate statutes[24] enacted by the legislature declaring such interests to be "real rights." On the other hand, counsel for the plaintiff endeavors to draw a distinction between "real rights" and incorporeal immovables, and argues that for conflicts of law purposes the royalty interests in question are incorporeal immovables irrespective of whether they are real rights under our jurisprudence.

After considering the innumerable ramifications of the problems involved in these arguments, it seems perfectly clear to us that "real rights" and incorporeal immovables are not separate and distinct concepts. While it is indeed unfortunate that Louisiana mineral law, which, to say the least, is already confused, should be further encumbered by common law terminology appearing in the statutes creating "real rights," we feel that this inadvertent use of semantics does not change the nature of the concept represented thereby. Consequently, we are of the opinion that the "real rights" created by the legislature merely constitute a species of incorporeal im-

22. Civil Code Art. 470. There is an analogous problem in common law states which recognize the concept of the chattel real.

23. See Gulf Refining Co. of Louisiana v. Glassell, 186 La. 190, 171 So. 846; Tyson v. Surf Oil Co., 195 La. 248, 196 So. 336; and Arnold v. Sun Oil Co., 218 La. 50, 48 So.2d 369.

24. Act 205 of 1938; Act 6 (2d Ex. Sess.) of 1950, now R.S. 9:1105; and Art. 3664 of the Code of Civil Procedure.

movable property irrespective of what they are termed, and therefore must be accorded the same treatment by the courts.

In Louisiana, ordinary leases create only personal rights. In the Glassell case,[25] the Supreme Court asserted that mineral leases also give rise only to personal rights. In 1938 the legislature enacted Act 205, which classified mineral leases and contracts applying thereto as real rights and incorporeal immovable property. Then in Tyson v. Surf Oil Company[26] the Supreme Court upheld the retroactive effect of this statute, but reasoned that it was procedural and not substantive in character. The legislature then enacted Act 6 (2d Ex. Sess.) of 1950,[27] which re-enacted the prior statute and provided that it is "substantive as well as procedural," and omitted any reference to its retroactive effect. Since its enactment, this statute has been observed primarily in its breach, with the courts "classifying" mineral leases as immovable only for certain purposes.[28] Defendants' counsel argue that since Act 6 (2d Ex. Sess.) of 1950 omitted any reference to its retroactive effect, no statute existed in 1936 and 1937, when the

25. Supra.

26. Supra. See also Arnold v. Sun Oil Company, Supra.

27. R.S. 9:1105, which provides as follows:

"Oil, gas, and other mineral leases, and contracts applying to and affecting these leases or the right to reduce oil, gas, or other minerals to possession, together with the rights, privileges, and obligations resulting therefrom, are classified as real rights and incorporeal immovable property. They may be asserted, protected, and defended in the same manner as may be the ownership or possession of other immovable property by the holder of these rights, without the concurrence, joinder, or consent of the landowner, and without impairment of rights of warranty, in any action or by any procedure available to the owner of immovable property or land. This Section shall be considered as substantive as well as procedural so that the owners of oil, gas and other mineral leases and contrats within the purpose of this Section shall have the benefit of all laws relating to the owners of real rights in immovable property or real estate."

28. See Little v. Haik, 246 La. 121, 163 So.2d 558; Reagan v. Murphy, 235 La. 529, 105 So.2d 210; Dixon v. American Liberty Oil Company, 226 La. 911, 77 So.2d 533; Perkins v. Long-Bell Petroleum Company, 227 La. 1044, 81 So.2d 389; Tinsley v. Seismic Explorations, Inc., 239 La. 23, 117 So.2d 897.

overriding royalties were created, making them immovable properties; thus, they erroneously conclude that at the time the royalty interests were created they were movables, and should remain so. This argument, however, is predicated on the false premise that the pertinent law is that of the date of the creation of the mineral interest. To the contrary, it is well settled that the right of inheritance and disposition is governed by the law in effect at the moment of death.[29] At the moment of death, the provisions of the 1950 statute made it clear that the overriding royalties involved herein were incorporeal immovables.

Finally, in 1960 the legislature enacted the present Code of Civil Procedure, Art. 3664, which reads as follows:

> "A mineral lessee or sublessee, owner of a mineral interest in immovable property, owner of a mineral royalty, or of any right under or obligation resulting from a contract to reduce oil, gas, and other minerals to possession, is the owner of a real right. These rights may be asserted, protected, and defended in the same manner as the ownership or possession of immovable property, and without the concurrence, joinder, or consent of the owner of the land."

It is thus apparent that there are now two statutes in existence which unequivocally provide that mineral leases and interests therein constitute "real rights."[30] In addition thereto, there exists a multitude of cases classifying such interests as movable or immovable for various purposes.[31] Therefore, in order to avoid placing the existing law upon the judicial anvil and hammering it into an unexpected shape, and in

29. See Henry v. Jean, 238 La. 314, 115 So.2d 363.
30. R.S. 9:1105 and Code of Civil Procedure Art. 3664, supra.
31. See cases cited above in footnote 11.

order to facilitate the writing of a more meaningful opinion, we are limiting the *ratio decidendi* hereof, or the effect of our ratiocination herein, to the area of conflicts of law involving the charactertization of succession property. In characterizing the royalty interests herein as either movable or immovable, for the purpose of descent and distribution, so as to determine whether Texas or Louisiana law applies, we are compelled initially to recognize that the clear intention of the legislature has been to impose upon mineral leases and contracts affecting these leases the qualities of incorporeal immovables.[32] Moreover, we must also recognize that the State of Louisiana, in order to maintain the integrity of its public records system, should not be forced to look, in either its sovereign or proprietary capacity, to the laws, decisions, or proceedings of another state in order to determine the ownership or possession of its own mineral rights.

Therefore, we conclude that for the purpose of characterizing succession property, i.e. descent and distribution, in the area of conflicts of law, overriding royalties and other interests in mineral leases are incorporeal immovables, so that the validity of foreign testamentary dispositions of such property located in this state definitely must be determined by the law of the State of Louisiana.[33]

The next vexatious question posed for our consideration is whether the provisions of the Simms testament which have been assailed herein are valid under Louisiana law. The pertinent portions of this aspect of the will have been related

32. See also Davidson v. Midstates Oil Corporation, 211 La. 882, 31 So.2d 7, and Arkansas Louisiana Gas Co. v. R. O. Roy & Co., 196 La. 121, 198 So. 768, which expressly classify mineral leases as incorporeal immovables.

33. See McKee v. Eskrigge, 139 So.2d 545.

hereinabove, and no useful purpose would be served by a reiteration thereof. Reference may be made thereto for the purpose of the following discussion.

The principal attack upon the will consists of the plaintiff's contention that the quoted provisions thereof constitute prohibited substitutions in violation of Section 16 of Art. IV of the Constitution of 1921, Civil Code Art. 1520, and R.S. 9:1791.

In answer to this argument, the defendants assert that the will is valid under Art. 2252 of the Louisiana Trust Code of 1964,[34] which endeavors to validate any provision or disposition in a trust created before its enactment if such provisions are not in conflict with the terms of the Code. Thus, the defendants argue that it is immaterial whether the provisions in question contain substitutions, since Art. 1723[35] validates dispositions which would constitute substitutions prohibited by law if they were made free of trust. In other words, the defendants insist that the Trust Code of 1964 was intended to have a retroactive effect.

It is unnecessary that we engage in a laborious discussion of this argument, since we conclude that the new Trust Code is not applicable herein. If we were to reason that Art. 2252 affected trusts which arose by virtue of the death of the testator prior to the enactment of the Trust Code, we would be divesting rights acquired in successions long closed.[36] It is too well settled to require citation in support thereof that if a statute is susceptible of two interpretations, one

34. R.S. 9:2252.
35. R.S. 9:1723.
36. See Succession of Forstner, 186 La. 577, 173 So. 111; Succession of Manning, 185 La. 894, 171 So. 68; Succession of Marion, 163 La. 734; 112 So. 667; Pires v. Youree, 170 La. 986, 129 So. 552.

constitutional and one unconstitutional,[37] the courts must afford it the benefit of a constitutional interpretation.[38]

Therefore, we are of the opinion that the Trust Code can have no effect on matters occurring before the effective date of its enactment in the year of 1964, which was long after the death of both Mrs. Simms and of her daughter, Mrs. Franzheim, from whom the plaintiff, Mrs. Reese, acquired her rights in the Succession of Mrs. Simms.

The doctrine of *le mort saisit le vif* has been the rule of Louisiana jurisprudence since 1825, and the succession descends to the heir from the moment of death, so that his or her rights are fixed as of that instant and may not be divested by the Trust Code of 1964.

In support of her argument that the provisions in question contain prohibited substitutions, plaintiff relies primarily on the pronouncements of the Supreme Court which appear in the Succession of Guillory[39] and also on the Succession of Meadors.[40] In the Succession of Guillory, the decedent, a Texas domiciliary, bequeathed Louisiana property to a bank as trustee, to be held in trust for the benefit of her son during his lifetime, and at his death the ownership of the property was to pass to the Baptist General Convention. In a very terse opinion, the organ of the Supreme Court concluded that this provision constituted a prohibited substitution, and upheld an exception of no right or cause of action to the petition to have the will recognized in Lotuisiana.

In the Succession of Meadors, decided by the Court of

37. See Louisiana Constitution of 1921, Art. IV, Secs. 15, 16.
38. Conley v. City of Shreveport, 216 La. 78, 43 So.2d 223.
39. 232 La. 213, 94 So.2d 38.
40. 135 So.2d 679.

Appeal for the Second Circuit, the testator's will bequeathed the property to a trustee, who was directed to pay the income therefrom to his wife and sister, and then to the survivor in case of the death of either of these relatives. Upon the death of both his wife and sister, the trust was to terminate, and the trust property was to pass to his intestate heirs as determined by the laws of Tennessee. Basing its decision primarily on the Guillory case, the court reasoned that the provision in question constituted a prohibited substitution.

In the Simms will, the testatrix bequeathed one-half of the disputed amount in trust to certain trustees for the benefit of her granddaughter, Lilly Franzheim McCullar, and on the death of her granddaughter the trust property was to pass to her great-grandchildren. The same provisions were contained in a trust bearing upon the other one-half of the disputed property, the beneficiary of which was Kenneth Franzheim, II. It was provided in both cases that in the event the great-grandchildren were minors at the time title to the property vested in them, it also would be placed in trust for their benefit.

It is obvious that the property was bequeathed to the trustees to be held in trust for their respective beneficiaries during their natural lives. Only upon the death of the beneficiaries was title to the property to go to the testatrix's great-grandchildren. In effect, the title to the bequeathed property was to vest in the trustees for their beneficiaries at the testatrix's death, and on the death of the beneficiaries, the title to the same property was to vest in the testatrix's great-grandchildren. Thus, the great-grandchildren were to take directly from the testatrix by a title which was to spring into existence only on the death of the trust beneficiaries.

This is a classic example of a substitution reprobated by Louisiana law[41] and exactly what the Supreme Court invalidated in the Guillory case. As pointed out by the court in Succession of Meadors, the testatrix endeavored to write a will for her legatees and to substitute her own will for the legal order of succession from her legatees.[42] Such a provision is an absolute nullity under Louisiana law.[43]

In view of what we have said hereinabove, we consider it unnecessary to accord additional consideration to the other arguments offered by the plaintiff in her attack upon her grandmother's will.

For the foregoing reasons, the judgment of the lower court is affirmed. All costs of these proceedings are to be paid by the defendants herein.

AFFIRMED

41. Succession of Thilborger, 234 La. 810, 101 So.2d 678.
42. Succession of Rougon, 223 La. 103, 65 So.2d 104.
43. Hoggatt v. Gibbs, 12 La. Ann. 70, 15 La. Ann. 700.

APPENDIX E

SUCCESSION OF	*	NO. 4270
LILLIE WEIR SIMMS, Widow of EDWARD F. SIMMS	*	25TH JUDICIAL DIST. COURT
	*	PARISH OF PLAQUEMINES
	*	STATE OF LOUISIANA

JUDGMENT ON THE MERITS

This matter having been tried on April 24, 1963 and May 31, 1963, and submitted for adjudication on the briefs and argument of the parties, for the written reasons this day filed:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the petitioner, Elizabeth Franzheim Reese, wife of Rudolph S. Reese, and against the defendants,

Kenneth Franzheim II, individually and as executor of the Succession of Lillie Weir Simms and as trustee of the trust provided in paragraph XIX-A of the will of the decedent, Lillie Weir Simms, dated January 3, 1957;

Lillie Franzheim McCullar, divorced wife of Myrlin McCullar, individually and as provisional administratrix of the Succession of Bessie Simms Franzheim and as tutrix of the minors, Lillie Celeste McAshan, Kenneth Alexander McAshan and Elizabeth Simms McAshan and Michael M. McCullar;

Lillie Celeste McAshan, Kenneth Alexander McAshan and Elizabeth Simms McAshan and Michael M. McCullar,

minors, through their under tutor, Leclare Ratterre, Jr.;

Alden X. Boddeker, Henry C. Riquelmy and W. P. Hamblen, each as trustee of the trusts provided in paragraphs XIX-A and XIX-B of the will of the decedent dated January 3, 1957, and each as executor of the Succession of Lillie Weir Simms;

Benjamin F. Kitchen III, Edward S. Kitchen and Elizabeth F. Kitchen, minors, through their duly appointed curator ad hoc, Chester A. Eggleston, and under tutor, Philip A. Masquelette;

That those portions of the last will and testament of Lillie Weir Simms, widow of Edward F. Simms, dated January 3, 1957, comprised within article XIX thereof, being the portions of said will and testament which attempted to dispose of the properties of the decedent in the State of Louisiana other than the one-third bequeathed to the decedent's daughter, Mrs. Bessie Franzheim, are and have been absolutely null, void and of no effect; and

IT IS FURTHERED ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of said petitioner and against said named defendants, cancelling, annulling, rescinding and setting aside all proceedings in the Succession of Lillie Weir Simms, widow of Edward F. Simms, No. 4270 of the Docket of this Court, relating to and based upon those portions of the said last will of January 3, 1957, declared to be absolutely null, void and without effect, including particularly, but not limited to, the probate thereof under date of June 5, 1957, as to the said null and void provisions, and the judgment of possession heretofore rendered under date of July 21, 1958, which is of record in Book 131, Page 1 under File No. 81767 of the Conveyance Records of the Parish

of Plaquemines, and elsewhere in other parishes of the State of Louisiana, insofar as paragraphs 2, 3 and 4 thereof are concerned, being those portions of said judgment which purported to carry into effect the said null and void provisions of the testament of January 3, 1957, all of which proceedings are declared to be and to have been null, void and without effect.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as to the two-thirds of the properties of the decedent, Lillie Weir Simms, which said decedent attempted to dispose of in article XIX of her will and which were included in the trusts purportedly established in the said judgment of possession of July 21, 1958, particularly paragraphs 2, 3 and 4 of said judgment of possession, the said decedent, Mrs. Lillie Weir Simms, died intestate and same were inherited by Mrs. Bessie Simms Franzheim, who is recognized as the sole and only child and forced heir of the decedent, Mrs. Lillie Weir Simms.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the petitioner, Elizabeth Franzheim Reese, and the defendants, Lillie Weir Franzheim McCullar and Kenneth Franzheim II, be and they are recognized as the sole children and forced heirs of Mrs. Bessie Simms Franzheim, and that in due course they are entitled to be placed in possession of the entirety of the immovable properties of the decedent, Lillie Weir Simms, described in the judgment of possession of July 21, 1958, two-thirds of which were inherited by and one-third of which was bequeathed to the decedent, Bessie Simms Franzheim. The determination of the portion of each of said three children and forced heirs of Bessie Simms Franzheim shall await final determination of the proceedings in the

matter of Succession of Bessie Franzheim, widow of Kenneth Franzheim, No. 5372 of the Docket of this Court, but the said three children of Bessie Simms Franzheim are recognized as her sole forced heirs and, as such, are each entitled to not less than two-ninths (2/9) of the said properties inherited by Mrs. Bessie Simms Franzheim as the sole child and forced heir of Lillie Weir Simms and bequeathed to her as the legatee under that portion of the will of Lillie Weir Simms, dated January 3, 1957, which is not declared null, void and without effect by this judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the petitioner is entitled in due course to a proper accounting from each of the defendants and any and all third parties who have heretofore received or who may have in their possession any of the properties, or income therefrom, or interest therein, to which petitioner is entitled.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there is reserved unto petitioner and to the defendants, Lillie Weir Franzheim McCullar and Kenneth Franzheim II, as the sole children and forced heirs of Bessie Simms Franzheim, all of the rights of each of them to establish in this or other appropriate proceedings the respective rights and interests of each of them as such sole children and forced heirs, both with respect to properties in Louisiana and elsewhere, as well as any and all rights with respect to the Succession or Estate of Lillie Weir Simms, widow of Edward F. Simms, as heirs of their said mother, Bessie Simms Franzheim, and with respect to the Succession of or Estate of their deceased father, Kenneth Franzheim, of whatever character and wherever situated.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the executors of the Succession of Lillie Weir Simms, Kenneth Franzheim II, Alden X. Boddeker, Henry C. Riquelmy and W. P. Hamblen, be and they are hereby ordered and directed to proceed to administer, in accordance with this judgment, the two-thirds of the estate of the decedent, Lillie Weir Simms, as to which the decedent's will and the judgment of possession heretofore rendered are declared to be and to have been null, void and without effect.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all costs be paid by the defendants.

JUDGMENT READ, RENDERED AND SIGNED in open Court at Pointe-a-la-Hache, Louisiana, this 14th day of February, 1964.

RUDOLPH M. McBRIDE
Judge, Section "B"

TWENTY-FIFTH JUDICIAL DISTRICT COURT IN AND FOR THE PARISH OF PLAQUEMINES

STATE OF LOUISIANA

NO. 4270

SUCCESSION OF

LILLIE WEIR SIMMS,

Widow of Edward F. Simms

* * *

REASONS FOR JUDGMENT ON THE MERITS

Heretofore, in reasons for judgment on disposition of declinatory exceptions, a brief statement of the nature of this action was included; however, the Court feels it appropriate to state in some detail the circumstances and issues on the merits, including, particularly, the exact language of those portions of the will of the decedent which Plaintiff seeks to have declared null and void.

Lillie Weir Simms, widow of Edward F. Simms, died in Houston, Harris County, Texas, the place of her residence, on May 1, 1957, survived by Bessie Simms Franzheim, wife of Kenneth Franzheim, as her sole and only child and forced heir. Mrs. Simms left a purported last will and testament, dated January 3, 1957, which was admitted to probate by the Probate Court of Harris County, Texas. By ancillary proceedings conducted in this Court, No. 4270, entitled "Succession of Lillie Weir Simms, widow of Edward F. Simms," the purported last will and testament of Mrs. Simms was, by order dated June 5, 1957, registered, probated and ordered

executed insofar as the provisions thereof concern property situated in the State of Louisiana. Subsequently, a judgment of possession was rendered in the ancillary proceedings under date of July 21, 1958, which judgment purported to place the legatees under the Simms' will in possession of her Louisiana estate.

Bessie Simms Franzheim, widow of Kenneth Franzheim, the sole and only child and forced heir of Lillie Weir Simms, died in Houston, Harris County, Texas, the place of her residence, on December 15, 1959, leaving as her sole and only children and forced heirs the Petitioner herein, Elizabeth Franzheim Reese, wife of Rudolph S. Reese, Lillie Franzheim McCullar, divorced wife of Myrlin McCullar, and Kenneth Franzheim, II. Mrs. Franzheim left a purported last will and testament, the probate of which is being contested in Harris County, Texas. Ancillary proceedings No. 5372, entitled "Succession of Bessie Simms Franzheim, widow of Kenneth Franzheim," have been opened in this Court but the purported last will and testament of Mrs. Franzheim has not been probated because of the will contest pending in Harris County, Texas.

On November 27, 1961, the Petitioner herein, Elizabeth Franzheim Reese, wife of Rudolph S. Reese, instituted the instant suit which was filed in the Succession proceedings of Lillie Weir Simms, No. 4270 on the docket of this Court, as required by Louisiana C.C.P., Art. 2931, (although it is an independent action) alleging the invalidity of Article XIX of Mrs. Simms' purported last will and testament, the invalidity of the order admitting the purported last will and testament of Mrs. Simms to probate, insofar as it concerns the provisions of Article XIX thereof, and the invalidity of judgment of possession, insofar as the same concerns the provisions of

Article XIX of the purported Simms will. Petitioner alleges that the provisions of the said Article XIX of the purported Simms will are absolutely null, void and without effect, that said provisions are violative of the laws and public policy of the State of Louisiana and in derogation of the public order. In particular, Petitioner asserts that the attempted dispositions set forth in said Article XIX contain substitutions prohibited by and in violation of Section 16 of the Fourth Article of the Constitution of 1921, Article 1520 of the Revised Civil Code and Article 9:1791 of the Revised Statutes; that the testamentary dispositions sought to be effected by Mrs. Simms in Article XIX of her purported will were attempted to be made by reference to extrinsic, non-testamentary inter vivos trust agreements; and that the dispositions attempted to be made in said Article XIX of the purported Simms will are in violation of Article 1573 of the Revised Civil Code which prohibits all testamentary dispositions which are committed to the choice of a third person.

The Defendants in this proceeding are all of the beneficiaries named in the testamentary trusts attempted to be created in Article XIX of the purported Simms will, the trustees of such purported trusts, the executors of the Simms succession and the provisional administratrix of the Franzheim succession. Lillie Franzheim McCullar and Kenneth Franzheim, II, who with Petitioner are the sole and only children and forced heirs of Bessie Franzheim, in their individual capacities are also made Defendants in this proceeding.

In this proceeding, Petitioner, Mrs. Reese, prays the rendition of judgment that the provisions contained in Article XIX of the purported Simms will are absolutely null, void and without effect, that the probate of said purported will insofar

as it relates to such provisions is absolutely null, void and without effect, and that the same be annulled and set aside; that the judgment of possession insofar as it concerns Article XIX of the purported Simms will is absolutely null, void and without effect and that the same be annulled and set aside; that Petitioner be recognized as one of the three forced heirs of her deceased mother, Bessie Simms Franzheim, who was the sole child and forced heir of the decedent, Lillie Weir Simms, and that Petitioner as such is entitled to be recognized as the heir to one-third of all the real estate, royalties, oil and gas and other mineral rights and properties owned by Mrs. Simms in the State of Louisiana and that such judgment further decree that Petitioner in due course is entitled to be placed in possession thereof; that Petitioner is entitled in due course to proper accounting from the Defendants herein and from any and all third parties who have received or who may have in their possession any of the properties or interests therein to which Petitioner is entitled; and that there be reserved unto Petitioner all of her rights to establish in this or other appropriate proceedings her rights and interests as one of the three children and as a forced heir of her mother, Mrs. Franzheim, both with respect to properties in Louisiana and elsewhere, as well as all of her rights with respect to the succession or estate of Mrs. Simms, as well as all of her rights with respect to the succession or estate of Kenneth Franzheim, the deceased father of Petitioner.

After making certain special bequests not necessary here to mention and after bequeathing to her daughter, Mrs. Bessie Franzheim, one-third (⅓) of all real estate and royalties owned by her in Louisiana, Mrs. Simms in Article XIX of her purported will attempted to dispose of all of the rest, residue and remainder of her estate in the following manner:

"All of the rest, residue and remainder of my estate, real, personal and mixed, of whatsoever kind and character and wheresoever situated, I give, devise and bequeath as follows:

"(A) One-half (½) thereof in trust to Bessie Franzheim, Kenneth Franzheim, II, Alden X. Boddeker, Henry C. Riquelmy and W. P. Hamblen, and their successors, the Trustees named in the LILLIE WEIR SIMMS TRUST FOR LILLIE FRANZHEIM McCULLAR, which Trust Agreement is recorded under file No. 69835 in Book 103 of Conv., Page —, and Book 1 of Don., Page —, et seq., in the Parish of Cameron, State of Louisiana, to be held and administered by them and the income from which shall be invested or distributed at the sole discretion of said Trustees, and shall be held by said Trustees and their successors with the same rights, powers and duties as are set forth in the above named Trust Agreement; save only that the income from the properties herein bequeathed to them as such Trustees may either be invested by them or distributed to the beneficiary, at their sole discretion, and said beneficiary shall not have the right to demand any distribution to her should the Trustees, in their sole and unlimited discretion, decide that such distribution is either unnecessary or unwise. Said properties herein bequeathed to said Trustees shall be held by them for and during the natural life of my said granddaughter, LILLIE FRANZHEIM McCULLAR, if she survives me, and after her death or my death, whichever occurs last, said properties shall pass to my great-grandchildren, LILLIE CELESTE McASHAN, KENNETH ALEXANDER McASHAN, ELIZABETH SIMMS McASHAN and MICHAEL M. McCULLAR, share and share alike, subject to the provisions of Paragraph (C) hereof.

"(B) The other one-half (½) thereof in trust to Kenneth Franzheim, Bessie Franzheim, Alden X. Bod-

deker, Henry C. Riquelmy and W. P. Hamblen, and their successors, the Trustees named in the LILLIE WEIR SIMMS TRUST FOR KENNETH FRANZHEIM, II, which trust agreement is recorded under file No. 69830 in Book 103 of Conv., Page —, and Book 1 of Don., Page —, et seq, in the Parish of Cameron, State of Louisiana, to be held and administered by them and the income from which shall be invested or distributed at the sole discretion of said Trustees, and shall be held by said Trustees and their successors with the same rights, powers and duties as are set forth in the above named Trust Agreement, save only that the income from the properties herein bequeathed to them as such Trustees may either be invested by them or distributed to the beneficiary, at their sole discretion, and said beneficiary shall not have the right to demand any distribution to him should the Trustees, in their sole and unlimited discretion, decide that such distribution is either unnecessary or unwise. Said properties herein bequeathed to said Trustees shall be held by them for and during the natural life of my said grandson, KENNETH FRANZHEIM, II, if he survives me, and after his death or my death, whichever occurs last, said properties shall pass to my great-grandchildren, LILLIE CELESTE McASHAN, KENNETH ALEXANDER McASHAN, ELIZABETH SIMMS McASHAN, MICHAEL M. McCULLAR, BENJAMIN FORD KITCHEN, III, EDWARD SIMMS KITCHEN, and ELIZABETH FRANCES KITCHEN, share and share alike, subject to the provisions of Paragraph (C) hereof.

"(C) In the event that at the time of the vesting of such properties in my said great-grandchildren, any of my said great-grandchildren named herein should be under the age of twenty-one (21) years, then and in that event the properties herein bequeathed to such minor shall pass to and become the properties of the Trustees of such great-grandchildren under the trusts which I

have heretofore created and which I now create as follows:

"(1) LILLIE WEIR SIMMS TRUST FOR LILLIE CELESTE McASHAN bearing file No. 69836 and recorded in Book 103 of Conveyance and Donation Book 1, Cameron Parish, Louisiana;

"(2) LILLIE WEIR SIMMS TRUST FOR KENNETH ALEXANDER McASHAN bearing file number 69837 and recorded in Book 103 of Conveyance and Donation Book 1, Cameron Parish, Louisiana;

"(3) LILLIE WEIR SIMMS TRUST FOR ELIZABETH SIMMS McASHAN bearing file number 69838 and recorded in Book 103 of Conveyance and Donation Book 1, Cameron Parish, Louisiana;

"(4) LILLIE WEIR SIMMS TRUST FOR BENJAMIN FORD KITCHEN, III, bearing file number 69834 and recorded in Book 103 of Conveyance and Donation Book 1, Cameron Parish, Louisiana;

"(5) LILLIE WEIR SIMMS TRUST FOR EDWARD SIMMS KITCHEN, bearing file number 69833 and recorded in Book 103 of Conveyance and Donation Book 1, Cameron Parish, Louisiana;

"(6) LILLIE WEIR SIMMS TRUST FOR ELIZABETH FRANCES KITCHEN, bearing file number 69832 and recorded in Book 103 of Conveyance and Donation Book 1, Cameron Parish, Louisiana;

"(7) As to MICHAEL M. McCULLAR, who has no trust provided for him as set out above, if at the time of the vesting of such properties in him he be under the age of twenty-one (21) years, then the share bequeathed to him shall pass to and become the properties of these

Trustees; W. P. Hamblen, Alden X. Boddeker, Henry C. Riquelmy and Bessie Franzheim. Such trust shall be created for the same length of time as is provided in the trusts set out in the paragraphs numbered (1) through (6) above, so that the Trustees in this trust, if created, shall hold said properties in trust for such minor child in the same manner as is provided in the trusts above named. Said Trustees shall execute an instrument in writing recordable in the parishes in Louisiana in which my property may be situated acknowledging that they hold said property in trust, and such instrument shall set out the terms and conditions of said trust as are set forth in those six (6) trusts above referred to.

(The trust agreements set out in Paragraphs (1) through (6) above are recorded in other parishes in Louisiana, but these references are given for the purpose of identifying the Trustees and the trust properties which shall pass in the event any of my properties shall go to any of the above named great-grandchildren under said trusts.)

"Such portion of my estate going to the Trustees of any of my said great-grandchildren under this, my Will, shall be held, managed and administered by said Trustees in the same manner, to the same extent, and with the same duties as are conferred in the Trust Agreements set out in Paragraphs (1) through (6) above, and shall be held by such Trustees for the same term as is set forth in such Trust Agreements, whereupon said properties herein bequeathed and the accumulations shall be paid over to my great-grandchildren."

The judgment of possession rendered in these proceedings under date of July 21, 1958, describes the Louisiana properties, places Mrs. Franzheim in possession of one-third (⅓) thereof and provides in paragraph 2 thereof that one-half (½) of the

remaining two-thirds (⅔), or one-third (⅓) of the described properties be placed in possession . . . "in trust in Bessie Franzheim, Kenneth Franzheim, II, Alden X. Boddeker, Henry C. Riquelmy and W. P. Hamblen, and their successors, Trustees named in the will of decedent probated herein, the legal title thereof to be held in trust by said Trustees during the term of the trust and the income therefrom to be paid to decedent's granddaughter, Lillie Franzheim McCullar, income beneficiary, during her life, and shall be held by said Trustees and their successors with the same rights, powers and duties as are set forth in the trust agreement, The Lillie Weir Simms Trust for Lillie Franzheim McCullar dated November 15, 1954, which trust agreement is recorded under File No. 69835 in Book 103 of Conveyances, Page —, and Book 1 of Donations, Page —, et seq, in the Parish of Cameron, State of Louisiana, and which is also recorded in Conveyance Office Book No. 178, Folio 787 and in Book of Donations No. 2 in the Parish of Plaquemines, State of Louisiana, save only that the income from the properties bequeathed to them as such Trustees may be invested by them or distributed to said beneficiary, Lillie Franzheim McCullar, at their sole discretion during the life of said beneficiary and, after her death, shall be distributed to decedent's great grandchildren, Lillie Celeste McAshan, Kenneth Alexander McAshan, Elizabeth Simms McAshan and Michael M. McCullar, share and share alike, who are recognized as and placed in possession herein as principal beneficiaries, subject to and in accordance with the provisions of Paragraph (c) of said will of decedent on file herein, dated January 3, 1957."

Paragraph 3 of the said judgment of possession provides that the other one-half (½) of the remaining two-thirds (⅔),

or one-third (⅓) of the property described, be placed in possession . . . "in trust to Bessie Franzheim, Kenneth Franzheim, Alden X. Boddeker, Henry C. Riquelmy and W. P. Hamblen, and their successors, trustees named in the will of decedent probated herein, the legal title thereof to be held in trust by said trustees during the term of the trust and the income therefrom to be paid to decedent's grandson, Kenneth Franzheim, II, income beneficiary, during his life, and shall be held by said trustees and their successors, with the same rights, powers and duties as are set forth in the trust agreement, The Lillie Weir Simms Trust for Kenneth Franzheim, II, dated November 15, 1954, which trust agreement is recorded under File No. 69830 in Book 103 of Conveyances, Page —, and Book 1 of Donations, Page —, et seq, in the Parish of Cameron, State of Louisiana, and which is also recorded in Conveyance Office Book No. 178, Folio 808 and in Book of Donations No. 2 in the Parish of Plaquemines, State of Louisiana, save only that the income from the properties bequeathed to them as such trustees may be invested by them or distributed to said beneficiary, Kenneth Franzheim II, at their sole discretion during the life of said beneficiary and, after his death, shall be distributed to decedent's great-grandchildren, Lillie Celeste McAshan, Kenneth Alexander McAshan, Elizabeth Simms McAshan, Michael M. McCullar, Benjamin Ford Kitchen, III, Edward Simms Kitchen and Elizabeth Frances Kitchen, who are recognized as and placed in possession herein as principal beneficiaries, share and share alike, subject to and in accordance with the provisions of paragraph (c) of said will on file herein, dated January 3, 1957."

The properties described in the will and in the judgment of possession consist largely of undivided interests in certain

oil, gas and mineral leases granted by the State of Louisiana which are sometimes referred to as overriding royalty interests, but which reference to the instruments in the record establishes to be undivided leasehold interests, including certain retained overriding royalty interests, as well as certain fee interests of comparatively minor value. The nature of the interests affected is of course important in view of the contention that the Louisiana law is inapplicable to such of these interests as are movable rather than immovable.

The disposition of the declinatory exceptions and the reasons for judgment incident thereto, already mentioned, have disposed of all questions relating to the jurisdiction of this Court, so the subject matters and persons involved and all parties necessary to the disposition of the issues presented are properly before the Court.

Able counsel for the defendants have vigorously urged that the Louisiana law is not applicable and that the law of the State of Texas is applicable in determining the validity of the disputed portions of the will, so far as these provisions dispose of the interests in Louisiana oil, gas and mineral leases which counsel refer to as overriding royalties. It was stipulated that the disputed dispositions of the will are valid testamentary bequests if such validity and effectiveness are to be determined under the laws of Texas.

It is entirely clear under L.S.A.C.C. 9, 10 and 491 that the Louisiana law is applicable if the property affected is immovable and that the laws of Texas is applicable if the property is movable. Heretofore, in connection with the declinatory exceptions, the Court has expressed the opinion that interests in oil, gas and mineral leases affecting property in

Louisiana, including overriding royalties, are immovables under the law of Louisiana. They are so defined in R.S. 9:1105. However, it is urged that the provisions of this act, as amended by Act 6 of the Second Extra Session of 1950 so as to specify that it was substantive as well as procedural, were not retroactive and that under the Louisiana jurisprudence and statutes a mineral lease is not a real right and gives rise only to personal rights. In the most recent expression of the Supreme Court relating to this statute, Hayes v. Muller, No. 46,472 of the Supreme Court, decided on rehearing on November 12, 1963, the Court emphasized the language of the statute which provides that the section is to be considered substantive as well as procedural, so that the owners of oil, gas and other mineral leases and contracts within the purpose of the section shall have the benefit of all laws relating to the owners of real rights in immovable property or real estate. When the decedent acquired these interests, although the leases themselves antedate the statute by many years, these provisions were in effect, said interest having been acquired by a conveyance as of November 17, 1953 from Southern Sulphur Corporation, as reflected in Exhibit G to the initial stipulation of the parties. It may well be, therefore, that having acquired these interests when the statute was in effect, the nature of the interests was controlled by the statute so far as any testamentary disposition is involved. However, the determination of this issue need not rest on that basis. Under *Regan vs. Murphy*, 235 La. 529, 105 So.2d 210 (1958), and other cases in which the effect of R.S. 9:1105 has been considered, while a mineral lease is not a real right in essence, that is, not a right in the thing but a right upon the thing, it is nevertheless, under Articles 463 and 470 of the Louisiana Civil Code, an incorporeal immov-

able. Further, as a right imposed upon the land, it forms a real obligation under Article 2015 of the Louisiana Civil Code. Still further, as a matter of conflict of laws, it is stated in Restatement, Conflict of Laws, Sec. 249, under Comment D, that for purposes of determining the validity of a testamentary disposition, all interests in land are treated as real property and the laws of the place where the land is controls. "Thus, a leasehold is in many states for certain purposes treated as personal property; nevertheless the validity of a will disposing of leaseholds is determined by the law of the state where the land is." The following special note under Sec. 208, Restatement of the Conflict of Law, at Page 298, is significant:

> "In civil law states, interests in things are not classified as real or personal property. In such states the distinction between 'immovable' and 'movable' things is employed. With a few exceptions, the distinction in civil law states between 'movable' and 'immovable' things corresponds to the distinction in common law states between real and personal property. The most important exception is that 'chattels real' which include leasehold interests in land are usually included under the term 'immovables,' although not treated, for many purposes, as 'real property.' Sometimes the words 'immovable things' are used synonymously with the words 'real property,' and the words 'movable things' are used synonymously with 'personal property.' Under such circumstances, the rules stated throughout the Restatement of this Subject pertaining to real property are applicable to immovable things, and the rules pertaining to personal property are equally applicable to movable things. The word 'movables' is a convenient term to include all kinds of things, whether tangible or intangible, interests in which constitute personal property and is so used throughout the Restatement of this Subject."

The plaintiff contends that the disputed dispositions are null and void for three reasons:

1. That they are prohibited substitutions in violation of Sec. 16 of the fourth article of the Constitution of 1921 and Art. 1520 of the La. C. C.

2. That they are null and void as having been attempted to be made by reference to extrinsic non-testamentary inter vivos trust agreements. (Certain of the provisions of the trusts sought to be established are fixed by reference to the terms of prior inter vivos trusts.)

3. That they are null and void as in violation of and prohibited by Art. 1573 of the Louisiana Civil Code, which renders null the institution of an heir and all other testamentary dispositions committed to the choice of a third person.

The prohibition against substitutions in the Louisiana law comes directly from the French sources and is deeply imbedded in the statutes, in the Constitution and in the jurisprudence. It would serve no purpose to reiterate definitions or distinguish between dispositions which have and those which have not been held to constitute substitutions. Innumerable legal articles have explored all the facets and the language which in some instances has been held to be a prohibited substitution and in others a valid bequest of a usufruct and of the naked ownership has been extracted, compared and analyzed in efforts to determine appropriate criteria and throw light upon the difficult questions involved. Difficult as the questions are when the disposition does not involve a trust, they become even more complicated when, as in the

present instance, the disposition is in trust. As a result of the decision of the Supreme Court in *Succession of Guillory*, 232 La. 213, 94 So.2d 38 (1957), concern was expressed that the trust would create a substitution if the gift was to trustees to hold, manage and invest and distribute to someone else at the termination of the trust and that all trusts in which income and principal beneficiaries were different might be invalid, as well as those trusts in which a usufruct is placed in trust or there is a shifting of income beneficiaries, The Guillory Case, Jackson and Jeter, XXXII Tulane Law Review 415 at page. 423. This article reviews the facts and result of the Guillory case and refers to previous definitions of prohibited substitutions and to numerous previous articles bearing upon the questions involved. Thereafter, the Court of Appeal for the Second Circuit decided Succession of Meadors, 135 So.2d 679 (La. App. 1961) (Certiorari denied). The Court, as stated by Professor Oppenheim in Oppenheim, A New Trust Code for Louisiana, Vol. XXXVII, Tulane Law Review 169 at page 171, adopted the strongest implications of the Supreme Court decision in the Succession of Guillory. This precipitated certain remedial legislation which is significant only in clarifying the invalidities involved since the legislation is not applicable to the determination of these proceedings, having been adopted subsequent to the death of the decedent. Article 1520 of the Louisiana Civil Code was amended by Act 45 of the Acts of 1962 and Article 4, Section 16 of the Constitution was amended by Act 521 of 1962 and a new article, Constitutional Amendment No. 17, adopted. Professor Oppenheim's article makes it clear that the amendments were designed to eliminate the grave doubts as to whether any trust which had separate income and principal beneficiaries did not contain a prohibited substitution and equally clear that any trust device not ex-

pressly permitted by the Trust Estates Law or recognizable as creating a prohibited substitution was within the influence and effect of the Meadors rule. The resolution, therefore, of the contention of the Plaintiff, that is, whether the disputed provisions were null and void as incorporating prohibited substitutions, must be determined by reference to the Guillory and Meadors decisions. The Court has been furnished with copies of the wills in each of the cited cases and has carefully considered them and compared them with the disputed provisions in this case. So doing, the Court is compelled to the same conclusion which was reached in each of the cited cases, that is, these bequests are clearly a prohibited substitution, violative of the public policy of this State, as expressed in the cited articles of the Constitution, Civil Code and Statutes, and even though such bequest might have been valid in Texas where the will was made, it cannot be enforced so far as it affects property in this State.

Distinguished counsel for the various defendants urge that the disputed dispositions are not within the scope of the prohibition against substitutions because the dispositions involved are not successive donations in full ownership but donations of revenues to one and property to another, and thus come within the rule of such cases as the Succession of Thilborger, 234 La. 810, 101 So.2d 678. They also urge the application of Civil Code Article 607, which provides that revenues may be given to one and the property to another. Professor Oppenheim, in an article in XXIII Louisiana Law Review, page 621, A New Trust Code for Louisiana, at page 627, refers to this article and to the fact that the jurisprudence has noted that the donation of the revenues of property is a kind of usufruct which is a peculiar type of usufruct un-

accompanied by any right to possession. It is further contended that the disputed provisions were validly interpreted in the judgment of possession to provide for permitted income and principal beneficiaries and that thus, no substitution is involved.

An analysis of the disputed provisions does not support the defendants' positions. In Article XIX of her purported will Mrs. Simms, the decedent, dealt with "All the rest, residue and remainder of my estate; real, personal and mixed of whatsoever kind and character and wheresoever situated . . . ," which she gave, devised and bequeathed one-half to trustees named in a prior inter vivos trust for Lillie Franzheim McCullar to be held and administered by them and the income from which was to be invested or distributed at their sole discretion and to be held with the same rights, powers and duties as set forth in the said trust agreement, save only that the income from "the properties herein bequeathed to them as such trustees" may either be invested by them or distributed to the beneficiary at their sole discretion with the beneficiary to have no right to demand any distribution. Said properties "bequeathed" to said trustees were to be held by them for and during the natural life of Lillie Franzheim McCullar, the decedent's granddaughter, if she survived the decedent and after the granddaughter's death or the decedent's death, which ever occurred lastly, "said properties shall pass to" certain great-grandchildren, subject to the provisions of paragraph C. Under paragraph C, in the event that at the time of the vesting of such properties in the great-grandchildren, any of them should be under the age of 21 years, then the properties "herein bequeathed to such minor shall pass to and become the properties of the trustees of such great-

grandchildren under trusts which I have heretofore created and which I now create as follows," naming various inter vivos trusts previously executed. As to one of the great-grandchildren who then had no trust, it was provided that if at the time of vesting of such properties in him, he be under 21, then the share bequeathed to him should pass to and become the property of said other named trustees with provisions for the terms and conditions thereof, and that the trustees should execute an instrument in writing, acknowledging that they hold the property in trust. Still further, it was provided that the trust references were given to identify the trustees and the "trust properties which shall pass in the event any of my properties shall go to any of the above named great-grandchildren under said trusts." The portions of the estate going to trustees of any great-grandchildren were to be held by the trustees for the same term as set forth in the trust agreements referred to, "whereupon said properties herein bequeathed and the accumulations shall be paid over to my great-grandchildren." The remaining one-half of the decedent's estate was bequeathed in trust under the same terms and conditions, except that this trust related to the grandson, Kenneth Franzheim II, rather than the granddaughter, Mrs. McCullar, and after his death, the properties were to pass to certain named great-grandchildren, again subject to the provisions of Paragraph C. It takes only a reading of these provisions to see that there were successive bequests of the same property and that each bequest was of the entirety. There was no true income beneficiary and no true principal beneficiary because each initial bequest to the trustees was of the entirety with full right of management and with distribution of income during the lifetime of the grandson or granddaughter solely at the discretion of the

trustees, so that the trustees would determine whether the grandson and granddaughter received any benefit at all from the bequest or whether upon the death of the grandson or granddaughter, all of the original properties, as they might then exist as a result of the trustees' management plus all of the income, would at that time pass to the great-grandchildren by virtue of a second bequest, which obviously was intended by the decedent to take effect only upon the death of the grandson or granddaughter and which could not have otherwise resulted because the properties were to pass either to the great-grandchildren or to other trustees, depending upon the age of the great-grandchildren at the time. Obviously, therefore, there were successive bequests of the same property and in fact, an effort to establish successive trusts which even the proposed revisions of the trust law do not envision. The disputed portions of the will, therefore, clearly come within the prohibitions announced by the Guillory and Meadors cases. They incorporate provisions which are clearly not expressly authorized by the law then in effect and which are recognizable substitutions.

The Court has considered the *Succession of Harper*, 147 So.2d 425 (La. Appeal 1963) Cert. denied 149 So.2d 766, and the discussion thereof in a note in XXXVII Tulane Law Review at page 566, and in a note in XXIV Louisiana Law Review, page 127, in which case the placing of a usufruct in trust, as if the trustee were the usufructuary with the naked ownership being disposed of to other parties, was allowed apparently because only the usufruct was left in trust. Judge Bolin, who spoke for the Court in Succession of Meadors, Supra, in a concurring opinion, was careful to point out the possible conflict with the rule of the Guillory and Meadors

cases, and it is apparent whether usufruct in trust in this case was a prohibited substitution was not determined because, not having been raised at the trial level, the Court declined to rule on the question. The distinction between the present case and the disposition in the Harper case is manifest from the dispositions themselves, since the disputed provisions place the entirety of the property in trust with successive dispositions upon the death of the decedent's grandchildren, and of course the contention that such dispositions are void as prohibited substitutions has been made initially.

The Court turns now to the second contention of the petitioner, that the disputed provisions of the will are null and void under Article 1573 of the Louisiana Civil Code. The Court is of the opinion that the dispositions are in violation of this Article because under the will the so-called income beneficiaries have no right to any of the income, but on the contrary, the trustees in their sole discretion could distribute or withhold, in whole or in part, all income and thus could determine whether the income was received either by the respective grandchild of the decedent or whether ultimately it would pass, along with the properties themselves, to the great-grandchildren, depending upon their age at the time title passed. This clearly leaves the designation of the heir to a third party and is prohibited. It is argued that the Trust Act permits accumulation of income and that Article 1573 is modified or restricted by the Trust Act, but an analysis of the applicable trust provisions clearly reveals that there is no authority for a trustee to determine distribution in his discretion among designated beneficiaries. The following quotation from an article in Volume XI, No. 1, May 1963, Louisiana Bar Journal, entitled "Some Tax Problems under the Proposed

Revision of the Louisiana Trust Estates Law" by Martin L. C. Feldman, beginning at page 49, and at page 56, is pertinent:

> "Although a number of provisions of the 1938 Trust Estates Law strongly suggest that the trustee can accumulate, the act is far from clear. And the validity of vesting a trustee with the discretion to determine time of payment is less clear. Article 1573 of the Civil Code prohibits the custom of willing by testament, by the intervention of a commissary or attorney-in-fact. The best illustration is the inability in Louisiana to bequeath property to an executor to be distributed by him in his discretion among a designated class of beneficiaries. But the prohibition of 1573 applies to trusts also, as does Article 1520. Therefore, Article 106 provides a much needed clarification of these questions. A provision such as Article 106 offers greater trust flexibility insofar as protecting the corpus and beneficiaries is concerned, as well as attractive income tax savings."

The reference to Article 106 is of course to the proposed trust code, yet to be adopted. The quotation makes it perfectly clear that Article 1573 is applicable and in effect, notwithstanding the contention that it is repealed to the extent that there is any inconsistency with the Trust Estates Act. In a discussion of powers of appointment under the proposed new trust code in Volume XXIII, Louisiana Law Review, page 621, at page 628, Professor Oppenheim clearly indicates that if the trust provides a standard which the trustee must follow, there would be no objection to an accumulation of part of income to be added to principal, but otherwise, it would be a power of appointment, forbidden by Civil Code Article 1573. The provisions of the will in the instant case provide no standard but leave solely to the trustees' discretion whether

all or any part of the income will go to one party or another. In the present case it is not the testator but the trustee who would be vested with the power to determine the benefits under the will.

Two of the trustees and executors, Messrs. Boddeker and Riquelmy, contend that any defects in the decedent's will were cured, ratified and waived by the petition and application of Mrs. Franzheim to execute the will and the judgment of possession based thereon and Mrs. Franzheim, the mother of the petitioner, could not now attack the validity of the trusts, having carried these dispositions into effect in compliance with her natural obligation under Civil Code Articles 1758 and 1759, and thus having confirmed, ratified and executed all the donations under Article 2274 of the Civil Code, as well as having created an estoppel under Article 1839 of the Civil Code, and further, that Mrs. Franzheim, as the sole heir of Mrs. Simms, by her action in petitioning the Court for judgment of possession and causing it to be entered, renounced whatever right she had with respect to the property bequeathed under the disputed dispositions of the will and that she did not, during her lifetime, and could not revoke such renunciation and that, as to all these conditions, the petitioner could have no greater rights than those possessed by her mother, Mrs. Franzheim. These defenses are not urged by Kenneth Franzheim II and Lillie McCullar, the remaining children and forced heirs of Mrs. Franzheim, who reserved, in the event any portion of the disputed dispositions are held to be null and void, their respective rights, both with respect to the properties in Louisiana and elsewhere, as children and as forced heirs of Mrs. Franzheim, and with respect to the Succession of Mrs. Simms. The defendant, Mrs. McCullar, as

Administratrix of the Succession of Mrs. Franzheim, likewise reserved all the rights and interests of said succession.

The Court has carefully considered the contentions of the trustees and executors named and has concluded that they are without merit. The primary basis for this conclusion is the nature of the nullity with which the disputed provisions are affected and the nature of the nullity with which all proceedings in the succession based upon such absolutely null provisions are affected. There is, further, no evidence of any intention on the part of Mrs. Franzheim to ratify or validate any invalid provision of her mother's will nor any evidence of an intent to renounce any benefit to which she might be entitled by virtue of any such invalidity. It is well established that an absolutely null disposition is not susceptible of ratification. There is nothing to ratify. The instrument, agreement or disposition which is absolutely null and void has no existence. *Hoggatt vs. Gibbs*, 15 La.Ann. 700; *Decuir vs. Lejeune*, 15 La.Ann. 569. It has already been established that the nullity of a prohibited substitution rests on motives of public order and nullities which are in derogation of public order are not susceptible of ratification. *Prestridge vs. Humble Oil & Refining Co.*, 131 So.2d 810 (Court of Appeal 1961). Mrs. Franzheim, if alive, could now attack these invalid dispositions and judgment of possession and as her forced heir, the petitioner can do the same. Thus, in the first disposition of Hoggatt vs. Gibbs, 12 La.Ann. 770, the grandchild was permitted to attack the validity of a will containing a substitution, even though the mother specifically attempted to ratify the prohibited disposition and was paid a consideration therefor. The complete and absolute nature of the invalidity of substitutions is also apparent by reference to the discussion

at pages 587 to 597 of Vol. 3, Part 2 (11th Ed. 1939), translation by Louisiana State Law Institute, Planiol Traite Elementaire de Droit Civil, and particularly, Sections 3287 and 3288. The following discussion in *Tapp vs. Guaranty Finance Company*, 158 So.2d 228 (Court of Appeal, 1st Circuit, 1963), relating to the effect of the nullity of a judgment obtained in violation of the prohibition of R.S. 13:4106 against the mortgagee or other creditor in proceeding against the debtor or any other of his property for a deficiency judgment in the absence of a legal appraisement, as to the effect of the violation of a prohibitory law is appropriate:

> "This is a prohibitory law and under LSA-Civil Code, Article 12, 'Whatever is done in contravention of a prohibitory law, is void, although the nullity be not formally directed.'
>
> "In the case of Phillips v. Bryan, 172 La. 269, 134 So. 88, in considering a plea of prescription of one year against an action to annul a judgment under Code of Practice Article 613 (now incorporated in Code of Civil Procedure Article 2004) and which it found to be in contravention of a prohibitory law, the Supreme Court of Louisiana held:
>
> " 'The prescription of one year against an action to annul a judgment obtained by fraud, or in consequence of the loss of a receipt, as provided for in article 613 of the Code of Practice, is not applicable to a confession of judgment made in violation of a law of public policy, because a transaction of that unlawful character cannot be made valid by ratification, either express or tacit. By the same token, we agree with the district judge that the plea of estoppel was not well founded. In fact, the plea was not sustained by a preponderance of evidence.' "

"Again in Cilluffa v. Monreale Realty Company, Inc., 209 La. 333, 24 So.2d 606, the Court in considering a plea of estoppel stated:

" 'The plea of estoppel is urged for the reason that plaintiff, Gaetano Cilluffa, did not protest or object to the seizure of all his right, title, and interest in the succession of his mother, Vincenza Giordano, notice of said seizure having been served on an attorney-at-law; that this notice of seizure shows knowledge on the part of said plaintiff of the rendition of the judgment against him which he now seeks to have annulled and set aside, and that plaintiff's allegation that he had no knowledge of such judgment until December 1, 1942, is contradicted by the records.

" 'Having concluded that, under the allegations of plaintiff's petition, the confession of judgment on which judgment was obtained violated the prohibitory provisions of the Constitution, we are of the opinion that this plea also is without merit, under the provisions of Articles 11 and 12 of Dart's Revised Civil Code, which read as follows:

" '11 (11) (N6). Waiver of laws.—Individuals cannot by their conventions, derogate from the force of laws made for the preservation of public order or good morals. * * *

" '12 (12). Acts contravening prohibitory law invalid.—Whatever is done in contravention of a prohibitory law is void, although the nullity be not formally directed.

" 'It is well settled that an agreement void as against public policy or because prohibited by law cannot be rendered valid by invoking the doctrine of estoppel.

" 'An acknowledgment can never be invoked to maintain a condition or state of things created in violation of a

prohibitory law. Factors' & Traders' Ins. Co. v. New Harbor Protection Co. et al, 37 La. Ann. 233.

" '• • • the Courts • • • recognize the doctrine that estoppel cannot be invoked to impair the force and effect of a prohibitory law. Rhodes v. Miller, 189 La. 288, 179 So. 430, 432.' "

The disputed dispositions are in violation of prohibitory laws, those in the Civil Code and the Constitution, as to substitutions and Article 1573 which prohibits testamentary dispositions committed to the choice of a third person. Accordingly, a condition or state of things created in violation of such prohibitory laws cannot be permitted to stand, notwithstanding any ratification or renunciation, if any such had been attempted, although there is no evidence of such specific, intention, nor can the doctrine of estoppel be invoked to avoid the effect of the prohibitory laws. Thus, none of the actions or proceedings in the Succession of Mrs. Simms, which are based upon the absolutely null and void dispositions of those portions of her will which are recognized to be in violation of law as substitutions and the designation of heirs by the intervention of third parties, can be accorded any legal effect and they are and have been absolutely null and void.

The same reasons which invalidate the contentions with respect to renunciation, ratification and estoppel apply equally to the contention that if there is any invalidity, the trusts should not be invalidated in their entirety under the provisions of R.S. 9:1843, since the nature of the invalidity is such that the entirety of the disputed provisions is affected. The Court has carefully considered the numerous decisions cited in support of the contentions of the defendants and in none of them is there any support for the view that a ratification

or renunciation can either perpetuate a disposition reprobated by law or that a natural obligation will validate a disposition reprobated by law. Under neither Article 1758 or 1846 of the Louisiana Civil Code would an invalidity of the nature here involved be effective. Further, even under the purported judgment of possession there is perpetuated the same vesting of properties in trustees, with the property ultimately to pass at a second death either to individuals or other trustees and with sole and complete discretion vested in trustees to determine the disposition of income, and these provisions are affected by the same nullity as that which affects the provisions of the will.

It is also contended that the judgment of possession closed the estate of Mrs. Simms and that the executors were discharged, and accordingly, Mrs. Simms' heirs are established. The record reflects that in truth, the executors continued to act after the judgment of possession, that they have never delivered the properties affected to the trustees, that the trustees are not now holding and administering the properties. Moreover, the absolutely null provisions of the will, the probate thereof and that part of the judgment of possession based thereon must be considered as if they did not exist. *Key v. Salley*, 218 La. 922, 51 So.2d 390 (1951). Therefore, the Succession of Mrs. Simms is not closed and as a result of the conclusion reached by the Court, it will be necessary that it continue to be administered as to the properties affected by the null and void dispositions.

It is also urged that the public policy of the State as evidenced by the Guillory and Meadors decisions is no longer in effect. The short answer to this is that the amendments to the Constitution and Civil Code which have been referred to

are not applicable and this matter must be determined on the basis of the law which was in effect when Mrs. Simms died. This is not to say that if they were applicable they would validate the disputed provisions and judgment, as is apparent from the article by Mr. Feldman in the Louisiana Bar Journal above referred to, because serious questions as to the effect of these amendments remain to be determined, but need not be determined in this matter.

The foregoing conclusions make it unnecessary to determine now the validity of the contention that in any event, the dispositions in dispute are invalid by reason of the reference in certain of the provisions of the trusts to extrinsic non-testamentary instruments, that is, prior inter vivos trusts, nor is there any other reason to consider other grounds on which said dispositions may be invalid.

Ancillary proceedings in the Succession of Mrs. Bessie Franzheim, No. 5372 of the Docket of this Court, are in process, but because of the will contest pending in Harris County, Texas, no will of that decedent has been probated. Until it has been determined whether decedent, Mrs. Franzheim died intestate or to what extent, if any, she died intestate and until the effect of any valid testament of such decedent has been determined in the said ancillary proceedings, the Court cannot determine whether the properties which were inherited by Mrs. Franzheim from her mother, Mrs. Simms, both by the valid legacy under the will and by reason of the invalidity of the disputed provisions of the will, were inherited in equal proportions by Mrs. Franzheim's three children or whether the one-third of her Louisiana estate representing the disposable portion may have been otherwise validly bequeathed. Accordingly, the petitioner and the defendants,

Mrs. McCullar and Mr. Franzheim, are each entitled to be recognized, by virtue of their forced portion in the estate of their deceased mother, Mrs. Franzheim, as the owner of two-ninths (2/9) of Louisiana properties so acquired by their mother from the Succession of Mrs. Simms, but as to the remaining one-third interest, the Court cannot now determine the disposition thereof. Therefore, it is necessary that the executors of the Succession of Mrs. Simms continue to administer that portion of the estate which is affected by the null and void provisions of the will so that in due course, there shall be delivered, either to the duly authorized succession representative of the Succession of Mrs. Franzheim for ultimate delivery to her heirs or to the three children of Mrs. Franzheim who are her sole forced heirs, the interest in the Louisiana properties affected, not less than an undivided two-ninths (2/9) thereof to each of said three children.

For the foregoing reasons judgment will be entered accordingly.

Pointe-a-la-Hache, Louisiana, this 14th day of February, 1964.

Rudolph M. McBride
JUDGE, SECTION "B"

Supreme Court of the United States

OCTOBER TERM, 1967.

Office-Supreme Court, U.S.
FILED
JUN 13 1967
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No. ~~1,400~~ 169

BENJAMIN F. KITCHEN, JR.,
Petitioner,

versus

ELIZABETH FRANZHEIM REESE,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Louisiana.

BRIEF OF KENNETH FRANZHEIM, II, AND WILLIAM P. HAMBLEN, TESTAMENTARY EXECUTORS OF THE SUCCESSION OF BESSIE SIMMS FRANZHEIM, RESPONDENT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

No. 1400.

BENJAMIN F. KITCHEN, JR.,
Petitioner,

versus

ELIZABETH FRANZHEIM REESE,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Louisiana.

BRIEF IN OPPOSITION OF KENNETH FRANZHEIM, II, ET AL., TESTAMENTARY EXECUTORS OF THE SUCCESSION OF BESSIE SIMMS FRANZHEIM, RESPONDENT.

MAY IT PLEASE THE COURT:

SUPPLEMENTAL STATEMENT OF THE CASE.

A. Although a respondent and appellee in the Supreme Court of Louisiana, this opponent has never

been served or made a party by petitioner, Benjamin F. Kitchen, Jr., and more than ninety days have expired since the judgment of the Supreme Court of Louisiana has become executory, and opponent alleges the Succession of Bessie Simms Franzheim has been prejudiced thereby as most of the property of Lillie Weir Simms under the complained of decision of the Supreme Court of Louisiana was given to it and petitioner's petition for writ of certiorari should either be denied for this reason and for other reasons, or the Succession of Bessie Simms Franzheim should be made a party respondent herein.

Only petitioner, Benjamin F. Kitchen, Jr., out of a number of defendants in the original proceedings, who litigated by appeal and also by application for certiorari to the Supreme Court of Louisiana the decision of the District Court which was adverse to them, has elected to petition this Court. Mrs. Simms attempted to establish two trusts by her will and also appointed executors in said will. None of the trustees of the two trusts which Mrs. Simms attempted to establish, none of the executors of Mrs. Simms' will, and none of the great-grandchildren of Mrs. Simms (with the exception of that filed by petitioner, Benjamin F. Kitchen, Jr., as tutor of his son, Benjamin F. Kitchen, III, a great-grandchild of Mrs. Simms) have filed with this Court a petition for writ of certiorari to the Supreme Court of Louisiana.

B. Both in the inter vivos trusts to which Mrs. Simms made reference in her will and also in the will itself there was language which established beyond the peradventure of a doubt that the testatrix, Lillie Weir Simms, definitely had in mind the law of the State of Louisiana rather than the law of the State of Texas. We quote from the will of Mrs. Simms dated January 3, 1957, as follows:

> (1) "My daughter, Mrs. Bessie Franzheim, under the laws of the State of Louisiana, is entitled to one-third of all the real estate and royalties owned by me in the said State of Louisiana, and it is my desire that she should receive this one-third." (Article XVII, will of Mrs. Simms as annexed to Petition for Probate at R. 12.)
>
> (2) Each of the inter vivos trusts referred to in the will and to which reference is made for the rights, powers and duties of the trustees and, in connection with the trusts for the great-grandchildren, for the purpose of identifying trustees and trust properties, provides in paragraph 17 thereof that ". . . this instrument shall be construed in all respects according to the laws of the State of Louisiana". (Exhibits A, B and C(1) through C(6) annexed to the stipulation of April 24, 1963, R. 192 et seq.)

C. The petition for certiorari states, at page 22, that ". . .nowhere in the will do either of the life tenants, the grandchildren, acting through Trustees or otherwise, have any right to sell, mortgage or

commit waste of the principal properties from which the income was expected to be derived. . . .". Each of the inter vivos trust agreements above referred to provides in paragraph 6 thereof that the trustees have the power to lease the trust property beyond the period of the trust, may borrow money on the credit of the trust estate, may mortgage the trust properties and may pledge the trust assets."

D. The Louisiana Supreme Court's decree dated November 7, 1966, is clearly based upon the finding that Article XIX of her will, which forms the basis for this litigation, was null and void because it contains a *prohibited substitution*. The decree was further based upon the determination of the Supreme Court of Louisiana upon an additional independent non-federal ground that many of the conditions under which the grandchildren and great-grandchildren are to succeed to the interest bequeathed them in the will are contained in the inter vivos trusts established by Mrs. Simms in 1954 and which inter vivos trusts Mrs. Simms made a part of her will by reference only, although they were intended to affect and relate to the disposition mortis causa of her property. We quote the following excerpt from the final decision of the Supreme Court of Louisiana, starting at page 75, in Appendix C, annexed to the petition for writ of certiorari, as follows

> "In the first place, it is apt to observe here that many of the conditions under which the grandchildren and great-grandchildren are to succeed to the interests bequeathed them in the

will are contained in the inter vivos trusts established by Mrs. Simms in 1954, and which she makes a part of her will by reference only, although they are intended to affect and relate to the disposition mortis causa of the property. Under the jurisprudence of this state *this invalidated the entire will.* Succession of Ledet, 170 La. 449, 128 So. 273 and Hessmer v. Edenborn, 196 La. 575, 100 So. 647. As stated in the latter case, with the late Justice Odom as the organ of the court: '. . . *where a testator refers to another witing for the purpose of manifesting the substance of his wish or desire, and where that wish cannot be ascertained without referring to such writing, then the testament . . . is invalid.*' (The emphasis has been supplied by respondent.)

"We are not unmindful of the fact that under the provisions of Articles 10, 491, and 1596 of the Revised Civil Code testaments are effective in this state where, as stated in the latter article, they are 'clothed with all the formalities prescribed for the validity of wills' where they were executed. But these articles have reference to matters of form that neither affect nor relate to the disposition of the property. In any event, and without resort to the documents which Mrs. Simms sought to incorporate in her will by reference alone, it is clear that Article XIX in itself contains a prohibited substitution pure and simple."

E. Under Item 2 of the captioned "Jurisdiction" petitioner refers to raising the federal question in the brief of petitioner in the Court of Appeals and also in the opinion on rehearing of the Louisiana Supreme Court. The constitutional complaint of the petitioner, as reflected in the references to the Louisiana Supreme Court opinion, was based upon the action of that Court in declaring the trust provisions invalid by applying the law of Louisiana. This contention was found to have no merit by the Supreme Court of Louisiana. Petitioner in his brief in the Court of Appeal at page 17, under the caption IV, set forth his contention that "the court's determination that Louisiana law applied, instead of that of Texas, under which the will is valid, is inequitable and is tantamount to a denial of the federal guaranteed rights of equal protection, U. S. Const. amend. XIV, Sec. 1, privileges and immunities, U. S. Const. art. IV., Sec. 2."

In the petition for writ of certiorari filed with this Court and directed to the Supreme Court of Louisiana the petitioner assigned as an error, alternatively with respect to the decision of the Court of Appeal for the Fourth Circuit, State of Louisiana, that the application by the Supreme Court of Louisiana of the Louisiana law to this case by nullifying the will of Mrs. Simms abridged rights of petitioner which were guaranteed by the Constitution of the United States of America, complaining that that court's finding that the law of Louisiana applied instead of the law of Texas was inequitable and de-

nied federal guaranteed rights. Petitioner took the same position in his original brief filed in the Supreme Court of Louisiana. Petitioner did not urge the contention now made in this Court to the effect that while the law of Louisiana is applicable, resort to the common law or the law of Texas should be made or had for the purpose of ascertaining the intention of decedent in her will and that the failure to do so resulted in a denial to petitioner of his constitutional rights until petitioner filed his brief in the Supreme Court of Louisiana supporting his application for a rehearing of that court's decision.

STATEMENT OF OPPOSITION.

The application of the Texas law in this case is not involved, but the Louisiana law is controlling. The question involved is what validity and legal effect is to be given to the will of a person domiciled in Texas on the date of her death insofar as it relates to property located in Louisiana which is classified by Louisiana law as an immovable, which is the same as real property under the nomenclature of the law of common law states. Immovable property under the law of Louisiana is in the same category as land. It is an old established rule that the law of each state controls the descent and distribution of immovable or real property within its borders. In this case the Louisiana law governs the alienation, transfer and descent of the immovable property referred to in Article XIX of the will of the decedent. The effect and construction of wills and

other conveyances are governed by the law of the state where the immovable or real property is located. *Olmsted vs. Olmsted,* 216 U.S. 386, 54 L.Ed. 530, 30 S.Ct. 292; *Hood vs. McGehee,* 237 U.S. 611, 59 L.Ed. 1144, 35 S.Ct. 718. Although petitioner concedes that the Louisiana law should be applied, it is his contention that if the law of Louisiana is applied this will deny him constitutional rights which the Supreme Court of Louisiana decided lacked merit. Petitioner has sought to escape the application of the old established law, which we have cited above, by contending that the Supreme Court of Louisiana deprived him of vested constitutional rights by failing to apply the same standards in interpreting the will of decedent as it would have used if decedent were a resident of Louisiana and, second, that the Supreme Court of Louisiana, even though the matter involved immovable or real property in Louisiana, should have construed the will of decedent in accordance with the common law and not in accordance with the law of Louisiana. There is a clear lack of a substantial federal question in this matter. There was also a failure on the part of petitioner in raising the specific constitutional question which petitioner now presents except in petitioner's brief in support of an application for rehearing. The constitutional question passed upon is not that referred to in petitioner's statement as to jurisdiction on page 2 of petitioner's brief.

Petitioner, so far as we can find in his application for a writ of certiorari, has cited no authority to up-

hold petitioner's contention that the interpretation by the Supreme Court of the State involving the validity of a will, insofar as it affects immovable real property within that state, according to the laws of that state, provides a basis for the denial of any federal right for the using of the discretion of this Court in granting writs of certiorari. Petitioner, likewise, has not cited any decision which shows that the Supreme Court of Louisiana has made any distinction between the interpretation of wills of residents of Louisiana and non-residents of Louisiana. Petitioner has not cited any authority which shows that the Supreme Court of Louisiana has discriminated in any manner in deciding the validity of a non-resident's will. All that petitioner seems to be trying to do is to substitute the law of the State of Texas for the law of the State of Louisiana so that he can persuade this Court to grant a writ of certiorari.

From *Olmsted vs. Olmsted, supra,* 216 U.S. at p. 395, 54 L.Ed. at p. 533, and 30 S.Ct. at p. 295, we quote the following:

> "We are not concerned with the correctness of the decision of the court of appeals of New York, interpreting its statutes and applying the law of its jurisdiction to the construction of the will of Silas Olmsted. We hold that there is nothing in the Federal Constitution requiring the courts of the state of New York to give force and effect to the statute of the state of Michigan, so as to control the devolution of title to lands in New York."

Petitioner contends that the decedent's intention should be determined by construing the language of the will according to the law of Texas. This would be an exception to the rule rather than the rule which we should apply here. The decedent clearly had in mind the law of the State of Louisiana if we refer to the will. In Paragraph XVII the decedent refers to the laws of Louisiana as follows:

> "My daughter, Mrs. Bessie Franzheim, under the laws of the State of Louisiana, is entitled to one-third of all the real estate and royalties owned by me in the said State of Louisiana, and it is my desire that she should receive this one-third."

Since Mrs. Bessie Franzheim was the only child of Mrs. Simms, she was entitled as forced heir to receive under the Louisiana law a legitime of one-third and Mrs. Simms shows in said provision of the will that she clearly had the law of Louisiana in mind in regard to her real estate and royalties owned by her in the State of Louisiana. The decedent in setting up inter vivos trusts prior to her death clearly did away with the presumption that as a domiciliary of Texas she intended the will to be construed under its law not only by reference to the aforesaid provision of her will but also by references in the will to the inter vivos trusts which she had set up prior to her death. She refers to these inter vivos trusts in Paragraph XIX of her will in subparagraph (a) where she refers to the trust agreement made in the inter vivos trusts. In this inter vivos trust agreement which is

referred to in the will it is provided that the trusts attempted to be created by the will are "to be held and administered by them, the income of which shall be invested or distributed at the sole discretion of said Trustees and shall be held by said Trustees and their successors with the same rights, powers and duties as are set forth in the above named trust agreement."

It is provided in the inter vivos trust ". . . . this instrument shall be construed in all respects according to the laws of the State of Louisiana." (Exhibits A, B and C(1) through C(6) annexed to the stipulation of April 24, 1963, R. 192 et seq.)

A reading of the petition of petitioner shows that he conceded that the effect of the bequest must be determined by the law of Louisiana. It is this legal effect of the language which the Supreme Court of Louisiana has determined invalidated the will, that is, the language of the will did not, according to the law of Louisiana, leave a usufruct of property to one and the naked ownership to another, which is the test used by the Supreme Court under the Louisiana law to determine the validity of the will.

Petitioner tries to allege discrimination in the manner used by the Supreme Court of Louisiana in determining whether or not there was a prohibited substitution and petitioner refers at page 14 of his petition to *Succession of Fertel*, 208 La. 614, 23 So.2d 234 (1945). In that case petitioner states that the hus-

band's usufruct and his son's legitime were recognized under the terms of a will which ". . .left the property to the husband, after death to the son." In a Per Curiam, 23 So.2d at p. 245, we find a statement of the manner in which the Louisiana courts determine whether provisions of a will violate Article 1520 of the Louisiana Civil Code or are permitted by Article 1522 of the Louisiana Civil Code. This excerpt from said case shows clearly that the disputed will did not leave the property to the husband of the decedent and after his death to the son. In the *Fertel* case decedent left "the use of" the property to her husband while in the *Simms* case decedent left title to the property to the trustees and after the termination of the trust bequeathed the property to great-grandchildren who were not beneficiaries of the trust. From the *Succession of Fertel* case we quote, at p. 245:

> "Barney Fertel is the only party who has applied for a rehearing. His contention is that the will is null in that it violates article 1520 of the Civil Code. The article provides that a testamentary disposition by which the legatee is charged with the duty to preserve the legacy for a third person, to whom the title is to pass at the death of the legatee is a prohibited substitution. According to article 1522 a bequest of the usufruct of property to one person and of the naked ownership to another is not a prohibited substitution and is therefore a valid disposition of both the usufruct and the ownership of the property. In deciding, in any given case, whether a legacy

> of this kind is violative of article 1520 of the Code, the only question is whether the intention of the testator as expressed in his will was to give the usufruct of the property to one person and the ownership to another, as permitted by article 1522 of the Civil Code. Each case is governed by the wording of the testament. The decisions on the subject are reviewed extensively, and compared in the Succession of Ledbetter, 147 La. 771, 85 So. 908. There is no necessity for reviewing or comparing the decisions again in this case. Here, the testatrix did not declare that she left her property to her husband, but declared that she left 'the use of it' to her husband, and that at his death it should go to her two daughters and her grandson. By the term 'the use of it' the testatrix must have meant the usufruct of the property, not the ownership of it."

It can clearly be seen that the decedent in the *Succession of Fertel* left to her husband the use of the property while in the *Simms* case the bequest to the trustees was not the use of the property, but the property.

Another case which involved the will of a Louisiana decedent was the *Succession of Ledbetter*, 147 La. 771, 85 So. 908, where the Supreme Court of Louisiana declared the will of a Louisiana decedent invalid because it violated Article 1520 of the Louisiana Civil Code and which is a clear example of the application of the same rule to the will of a Louisiana decedent as in the present case of a Texas resident decedent.

We quote from the *Succession of Ledbetter*, at p. 773 referring to the will as follows:

> " 'Second. After complying with the above provisions, I wish my son, Dr. Wiltz M. Ledbetter, to have the half of remaining part of my estate or the half of the revenues therefrom during his lifetime. But should he die without an heir or child I wish his part of my estate to be paid or go to my present grandchildren, viz.: Wiltz M. Ledbetter, William V. Ledbetter and Joanna Ledbetter (children of Dr. Marion Ledbetter) and equally with these any other grandchildren that may yet be born.' "

We again quote from the *Succession of Ledbetter*, at p. 779 where the Louisiana Supreme Court said:

> " 'The bequest in this case is as plain a substitution as can be conceived. According to article 1520 of the Code, it is absolutely null. To declare it valid, under the doctrine that the giving of property to one person during his life and at his death to another is the giving of a life usufruct to one and the naked ownership of the property to the other legatee would be an absolute violation of article 1520 of the Code.
>
> " 'Being therefore compelled now to elect whether to correct or perpetuate the error of the doctrine announced in Rice v. Key and repeated in the Succession of McDuffie, we now correct the error, and overrule those decisions in so far as they hold that the giving of property to one per-

son during his life and at his death to another is the giving of the usufruct to one and the naked ownership of the property to the other legatee.' "

The test of whether a substitution prohibited by our law is contained in a will is that it vests the property in one person at the death of the testator and upon the death of that person, in whom it was vested at the death of the testator, the same property is vested in another person who takes the property directly from the testator but by a title which only springs into existence on the death of the first donee. By making this disposition in the will the testator destroys the power of the first donee to alienate the property, because the first donee is bound to hold the property until his death so that the person then called to the title upon the death of the first donee may take same. The second donee during the life of the first donee has no power of alienation because his title does not spring into existence until the death of the first donee. This is a substitution and is reprobated under the law of the State of Louisiana.

Petitioner has referred to certain decisions of the Louisiana Supreme Court (see Appendix C, page 68, of the petition herein). With the exception of the *Guillory* and *Meadors* cases, the Louisiana Supreme Court discussed substitutions involved in wills of Louisiana residents. It therefore clearly appears that not only did petitioner not become vested with any property interest under Louisiana law but that he was not discriminated against by the

Louisiana Supreme Court in its application of the Louisiana law. We quoted from the decision of the Louisiana Supreme Court, at page 4 *supra,* which is sought here to be reviewed, and which quotation shows that it was based on a substantial and sufficient non-federal ground. If it appears that the decision in a state court judgment rests on an independent, non-federal ground, which is adequately supported, this Court has established a principle of not reviewing that state court judgment. See Comment and Authorities, Sec. 158, page 337 et seq. of West's Federal Forms, Vol. 1.

SUMMARY AND CONCLUSION.

It therefore is quite clear that the petition does not have any basis upon which this Court should grant a writ of certiorari. This case involves the validity of a will relating to immovable or real property within the State of Louisiana. The law of Louisiana and the interpretation thereof by the Louisiana Supreme Court is therefore controlling. Petitioner has conceded that the effect is to be determined by the law of Louisiana, and petitioner's suggestion that the Texas law should be applied in interpreting the will in this case cannot be applied to the circumstances of this case. Here Mrs. Simms, the decedent, contemplated the application of the law of Louisiana both in her will and in the reference thereto in the inter vivos trusts. The legal effect of what Mrs. Simms has done must be determined by the law of Louisiana where the immovable and real property is located.

This case lacks any substantial federal question, and petitioner has not heretofore raised the specific constitutional issues which petitioner now urges. Further, the Louisiana Supreme Court decided that decedent's will could not under the law of Louisiana incorporate extrinsic, non-testamentary trust instruments, and that this likewise invalidated the will. This alone provides a substantial and sufficient non-federal ground as to which no issue has been taken by the petitioner.

For all of the above and foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

.....
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Franzheim, Respondent.

PROOF OF SERVICE.

I, John L. Toler, attorney for respondents, Kenneth Franzheim, II, and William P. Hamblen, Testamentary Executors of the Succession of Bessie Simms Franzheim, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this day I served copies of the foregoing Brief of Respondents on Petition for Writ of Certiorari on:

H. Alva Brumfield and
Sylvia Roberts
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and

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and

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Joseph V. Ferguson II
902 Whitney Bank Bldg.
New Orleans, Louisiana
Counsel for Elizabeth Franzheim Reese, Respondent,

by mailing a copy thereof, postage prepaid, addressed to their offices as above shown and at the addresses above shown.

New Orleans, Louisiana, this . . . day of June, 1967.

.....

JOHN L. TOLER.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 1400 169

BENJAMIN F. KITCHEN, JR.,
Petitioner,

versus

ELIZABETH FRANZHEIM REESE.

On Petition for Writ of Certiorari to the Supreme Court of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE
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October Term, 1967

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BENJAMIN F. KITCHEN, JR.,
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v.

ELIZABETH FRANZHEIM REESE.

On Petition for Writ of Certiorari to the
Supreme Court of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

MAY IT PLEASE THE COURT:

SUPPLEMENTAL STATEMENT OF THE CASE

A. Petitioner alone among the defendants in the original proceedings who litigated by appeal and application for certiorari through the Supreme Court of Louisiana, the adverse decision of the district court, has elected to petition this Court. The trustees of the two trusts which the decedent, Mrs. Simms, attempted to establish, the executors of Mrs. Simms' will and all of the great-grandchildren of Mrs. Simms to whom she provided that the property was to pass after the death of the respective beneficiaries of said trusts, other than the petitioner, have filed no petition with this Court.

B. There is specific language in the will of Mrs. Simms, and the inter vivos trusts to which she made

reference, establishing that the testator had in mind the law of the state of Louisiana rather than that of Texas, as follows:

(1) "My daughter, Mrs. Bessie Franzheim, under the laws of the state of Louisiana, is entitled to one-third of all the real estate and royalties owned by me in the said state of Louisiana, and it is my desire that she should receive this one-third." (Article XVII, will of Mrs. Simms as annexed to Petition for Probate at R. 12.)

(2) Each of the inter vivos trusts referred to in the will and to which reference is made for the rights, powers and duties of the trustees and, in connection with the trusts for the great-grandchildren, for the purpose of identifying trustees and trust properties, provides in paragraph 17 thereof that ". . . this instrument shall be construed in all respects according to the laws of the State of Louisiana". (Exhibits A, B and C(1) through C(6) annexed to the stipulation of April 24, 1963, R. 192 et seq.)

C. Although it is stated at page 22 of the petition that ". . . nowhere in the will do either of the life tenants, the grandchildren, acting through Trustees or otherwise, have any right to sell, mortgage or commit waste of the principal properties from which the income was expected to be derived. . .", each of the inter vivos trust agreements above referred to provides in paragraph 6 thereof that the trustees have the power to lease the trust property beyond the period of the trust, may borrow money on the credit of the trust estate, may mortgage the trust properties and may pledge the trust assets.

D. The decree of the Supreme Court of Louisiana is based not only upon its determination that the disputed dispositions of the decedent's will were null and void because they contained a prohibited substitution, pure and simple, but also upon an additional independent and sufficient non-federal ground, as to which the petitioner takes no issue, and which is evidenced by the following excerpt from the final decision of the Supreme Court of Louisiana, reflected, beginning at page 75, in Appendix C of the petition:

> "In the first place, it is apt to observe here that many of the conditions under which the grandchildren and great-grandchildren are to succeed to the interests bequeathed them in the will are contained in the inter vivos trusts established by Mrs. Simms in 1954, and which she makes a part of her will by reference only, although they are intended to affect and relate to the disposition mortis causa of the property. Under the jurisprudence of this state *this invalidated the entire will.* Succession of Ledet, 170 La. 449, 128 So. 273: and Hessmer v. Edenborn, 196 La. 575, 100 So. 647. As stated in the latter case, with the late Justice Odom as the organ of the court: '. . . *where a testator refers to another writing for the purpose of manifesting the substance of his wish or desire, and where that wish cannot be ascertained without referring to such writing, then the testament . . . is invalid.*' (The emphasis has been supplied.)

> "We are not unmindful of the fact that under the provisions of Articles 10, 491, and 1596 of the Revised Civil Code testaments are effective in this state where, as stated in the latter article, they are 'clothed with all the formalities prescribed for the validity of wills' where they were executed. But these articles have reference to matters of form that neither affect nor relate to the disposition of the property. In any event, and without resort to the documents which Mrs. Simms sought to incorporate in her will by reference alone, it is clear that Article XIX in itself contains a prohibited substitution pure and simple."

E. Petitioner, under item 2 of the caption "Jurisdiction", refers to the raising of the federal question in petitioner's brief in the Court of Appeal and to the opinion on rehearing of the Louisiana Supreme Court. As reflected in the references to the Supreme Court opinion, the constitutional complaint of the petitioner was based upon the action of the Court in invalidating the trust provisions by application of Louisiana law. It was this contention that the Supreme Court of Louisiana found to have no merit. Similarly, in Petitioner's brief in the Court of Appeal, under the caption IV thereof at page 17, the contention was that "the Court's determination that Louisiana law applied, instead of that of Texas, under which the will is valid, is inequitable, and is tantamount to a denial of the federal guaranteed rights of equal protection, U. S. Const. amend. XIV, Sec. 1, privileges and immunities, U. S. Const. art. IV,, Sec. 2." In the petition for writ of certiorari directed to the Supreme Court of Louisiana, with respect to the decision of the Court of Appeal for the Fourth

Circuit, State of Louisiana, the petitioner assigned as an error, alternatively, assuming that the disputed dispositions were inimical to the law of Louisiana, that the Court's application of Louisiana law to the case, thereby nullifying the will, abridges rights guaranteed by the United States Constitution, and complained that the Court's determination that the Louisiana law applied instead of that of Texas was inequitable and tantamount to a denial of the federal guaranteed rights. The same position was taken in the original brief of petitioner in the Supreme Court of Louisiana. It was not until the brief filed by petitioner in the Louisiana Supreme Court in support of his application for rehearing that petitioner urged the contention now made in this Court to the effect that while the Louisiana law is applicable, resort to the common law or the law of Texas should be had for the purpose of ascertaining the decedent's intention, and that the failure to do this resulted in denial of constitutional rights, as previously urged.

STATEMENT OF OPPOSITION

This controversy relates solely to a question of Louisiana law, that is, the validity and legal effect of a will of a resident of Texas, insofar as it relates to property in Louisiana, classified under the law of Louisiana as immovable, that is, real property or property in the same category as land. It is a firm, long established rule that each state is the sole mistress of the devolution of property within its borders and it is to the law of that state to which one must look for the rules which govern descent, alienation, and transfer, and for the effect and construction of wills and other conveyances. *Olmsted vs. Olmsted,* 216 U.S. 286, 54 L. Ed.530, 30 S.C. 292; *Hood vs. McGehee,* 237 U.S. 611,

59 L.Ed. 1144, 35 S.C. 718. Although these two cases involved the application of the full faith and credit clause, the principles stated are equally applicable.

Petitioner concedes the application of the Louisiana law, although it was his contention that the application of the Louisiana law resulted in the denial of constitutional rights, which the Supreme Court of Louisiana found to have no merit. Petitioner now seeks to avoid the effect of the fundamental rule of law cited above by claiming, first, that the Supreme Court of Louisiana, as a matter of conflicts of law, should have construed the will in accordance with common law terminology and, second, that it discriminated against the petitioner and thus deprived him of vested constitutional rights by failing to apply the same standards of interpreting the decedent's will as would have been used if she were a resident of Louisiana. There is a patent lack of substantial federal question in this matter, as well as a failure to raise the specific constitutional question now presented, except in a brief in support of application for rehearing. The constitutional question sought to be raised is not that passed upon as referred to in petitioner's statement in Basis for Jurisdiction.

No authority is cited to establish petitioner's contention that an interpretation by the highest court of the state with respect to the validity of a will, insofar as it affects property within that state, in accordance with the laws of that state, provides any basis for the denial of any federal right or the exercise of this Court's discretion in granting writs of certiorari. Nor is anything cited to reflect either any improper classification as between residents and non-residents under the Louisiana statute, or any opinion or action of the

Louisiana courts which in any manner discriminates when determining the validity of a will of a non-resident. The argument under article I. of the Reasons for Granting the Writ is simply an attempt to re-argue the merits of the matter and an attempt to inject into the law of Louisiana the laws of the state of Texas. The following quotation from *Olmsted vs. Olmsted,* supra, 216 U.S. at p. 295, 54 L.Ed. at page 533, and 30 S.C. at p. 295, is appropriate:

> "We are not concerned with the correctness of the decision of the court of appeals of New York, interpreting its statutes and applying the law of its jurisdiction to the construction of the will of Silas Olmsted. We hold that there is nothing in the Federal Constitution requiring the courts of the state of New York to give force and effect to the statute of the state of Michigan, so as to control the devolution of title to lands in New York."

As to the petitioner's contention that the decedent's intention should be determined by construing the language of the will according to the law of Texas, if there were any validity to the rule of law cited, although clearly the Louisiana courts are not required to follow it, it is the exception to that rule rather than the rule which is applicable here. The decedent clearly had in mind the law of the state of Louisiana as indicated by the references in the will and the inter vivos trusts, thus negating any presumption that as a domicilliary of Texas, she intended the will to be construed under its law. The petitioner concedes that the effect of the bequests must be determined by the law of Louisiana, even if the meaning of the language is to be

otherwise determined, and it is the legal effect of the language which the Supreme Court of Louisiana has determined invalidated the will, that is, the language of the will did not, under the law of Louisiana, leave the usufruct of the property to one and the naked ownership to another, which is the test of validity under the Louisiana law as hereinafter reflected.

As to the matter of the alleged discrimination in the manner by which the Supreme Court of Louisiana determined whether or not there was a prohibited substitution which invalidated the disputed dispositions of Mrs. Simms' will, the petitioner referred at page 14 of the petition to the Succession of Fertel, 208 La. 614, 23 So.2d 234 (1945), stating that there the husband's usufruct and his son's legitime were recognized under the terms of a will which ". . . left the property to the husband, after death to the son". Reference to that case shows that it contains in a Per Curiam, at 23 So. (2d) p. 245, a concise statement of the manner in which the Louisiana courts determine whether a testamentary disposition violates Article 1520 of the Louisiana Civil Code or is permitted by Article 1522. Further, this excerpt specifically refutes the statement that the disputed will left the property to the husband of the decedent and after his death to the son. The following quotation reflects this test and the clear distinction between the case there and the present case, in that the decedent Fertel left the *use* of the property to her husband while the decedent Simms left title to the *property* to the trustees, and at the termination of the trust, bequeathed the property to great-grandchildren who were not beneficiaries of the trusts:

"Barney Fertel is the only party who has applied for a rehearing. His contention is that the will is null in that it violates article 1520 of the Civil Code. The article provides that a testamentary disposition by which the legatee is charged with the duty to preserve the legacy for a third person, to whom the title is to pass at the death of the legatee is a prohibited substitution. According to article 1522 a bequest of the usufruct of property to one person and of the naked ownership to another is not a prohibited substitution and is therefore a valid disposition of both the usufruct and the ownership of the property. In deciding, in any given case, whether a legacy of this kind is violative of article 1520 of the Code, the only question is whether the intention of the testator as expressed in his will was to give the usufruct of the property to one person and the ownership to another, as permitted by article 1522 of the Civil Code. Each case is governed by the wording of the testament. The decisions on the subject are reviewed extensively, and compared in the Succession of Ledbetter, 147 La. 771, 85 So. 908. There is no necessity for reviewing or comparing the decisions again in this case. Here, the testatrix did not declare that she left her property to her husband, but declared that she left 'the use of it' to her husband, and that at his death it should go to her two daughters and her grandson. By the term 'the use of it' the testatrix must have meant the usufruct of the property, not the ownership of it."

It is seen that in *Fertel* the decedent left to her husband not the *property* but the *use* of it, while in Simms the bequest to the trustees was not the use of the property but the *property*.

The *Succession of Ledbetter,* 147 La. 771, 85 So. 908, which involved the will of a Louisiana decedent which was declared invalid because it violated Article 1520 of the Louisiana Civil Code, is a clear illustration of the application of the same rule to the will of a Louisiana decedent as in the present case. The following excerpts from that decision, the first of which incorporates the disputed disposition and the following two portions of which the legal principles, are pertinent:

> " 'Second. After complying with the above provisions, I wish my son, Dr. Wiltz M. Ledbetter, to have the half of remaining part of my estate or the half of the revenues therefrom during his lifetime. But should he die without an heir or child I wish his part of my estate to be paid or go to my present grandchildren, viz.: Wiltz M. Ledbetter, William V. Ledbetter and Joanna Ledbetter (children of Dr. Marion Ledbetter) and equally with these any other grandchildren that may yet be born.' "

> "The bequest in this case is as plain a substitution as can be conceived. According to article 1520 of the Code, it is absolutely null. To declare it valid, under the doctrine that the giving of property to one person during his life and at his death to another is the giving of a life usufruct to one and the naked ownership of the property to the other legatee would

be an absolute violation of article 1520 of the Code.

"Being therefore compelled now to elect whether to correct or perpetuate the error of the doctrine announced in Rice v. Key and repeated in the Succession of McDuffie, we now correct the error, and overrule those decisions in so far as they hold that the giving of property to one person during his life and at his death to another is the giving of the usufruct to one and the naked ownership of the property to the other legatee."

An early Louisiana case involving the will of a Louisiana decedent, *Marshall vs. Pearce,* 34 La.Ann. 557, also states a simple test of the prohibited substitution as follows:

"The simplest test of the substitution prohibited by our law, is that it vests the property in one person, at the death of the donor, (in case of testaments) and, at the death of such person, vests the same property in another person, who takes the same directly from the testator, but by a title which only springs into existence on the death of the first donee. Such a disposition destroys the power of alienation of the property by the first donee, because he is bound to hold it until his death, in order that the person then called to the title may take it. At the same time, no power of alienation exists in the second donee during the life of the first, because his title only comes into being at the death of the latter."

Each of the decisions referred to by the Louisiana Supreme Court, beginning at Appendix C, page 68, of the petition herein, in which the Court discussed the matter of substitutions, involved the will of a Louisiana resident, other than *Guillory* and *Meadors*. It is apparent from the foregoing that not only did petitioner not become vested with any property interest under the Louisiana law, but that there was no discrimination in the application of the Louisiana law.

As reflected in the excerpt from the opinion of the Louisiana Supreme Court at page 3, supra, there is a substantial and sufficient non-federal ground upon which the decision of the Louisiana Supreme Court, sought to be reviewed, is also based. The principle that the Court will not review a state court judgment if it appears it rests on an independent, non-federal ground, adequate to support it, is firmly established. See Comment and Authorities, Sec. 158, page 337 et seq of West's Federal Forms, Vol. 1.

SUMMARY AND CONCLUSION

The petition presents no basis for the grant of a writ of certiorari. The controversy involves the validity of a will as it relates to property within the state of Louisiana, as to which the law of Louisiana and the interpretation thereof by the Louisiana courts are controlling. The suggestion that the language of the will should be interpreted in the light of the law of Texas, although petitioner concedes that the legal effect is to be determined by the law of Louisiana, is inapplicable to the circumstances of this case because the decedent clearly contemplated the application of the law of Louisiana, and it is legal effect which has

been determined. Neither the applicable Louisiana statutes nor the application and interpretation thereof by the Louisiana courts reflect any improper classification or discrimination as between residents and non-residents of the state of Louisiana. There is clearly no substantial federal question, nor has the petitioner heretofore properly raised the specific constitutional issues now urged. Further, the substantive defect in the decedent's will resulting from the attempt to incorporate extrinsic, non-testamentary instruments, contrary to the law of Louisiana, invalidated the will, and provides a substantial and sufficient non-federal ground, as to which the petitioner has taken no issue. Accordingly, for the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Morris Wright, attorney for respondent, Elizabeth Franzheim Reese, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing Brief of Respondent on Petition for Writ of Certiorari on:

H. Alva Brumfield and
Sylvia Roberts
509 St. Louis Street
Baton Rouge, Louisiana

and

Decatur J. Holcombe
809 First City National Bank Bldg.
Houston, Texas

counsel for petitioner, by mailing a copy thereof, postage prepaid, addressed to their offices as shown above.

New Orleans, Louisiana, this ____ day of _____, 1967.

_____

MORRIS WRIGHT

SUPREME COURT, U. S.

SEP 16 1967

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 169

BENJAMIN F. KITCHEN, JR.,
Petitioner,

versus

ELIZABETH FRANZHEIM REESE,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Louisiana.

BRIEF OF LILLIE WEIR FRANZHEIM McCULLAR, RESPONDENT.

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967.

No. 169.

BENJAMIN F. KITCHEN, JR.,
Petitioner,

versus

ELIZABETH FRANZHEIM REESE,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Louisiana.

BRIEF IN OPPOSITION OF LILLIE WEIR FRANZHEIM McCULLAR, RESPONDENT.

MAY IT PLEASE THE COURT:

SUPPLEMENTAL STATEMENT OF THE CASE.

A. Although a respondent and appellee in the Supreme Court of Louisiana, this opponent has never been served or made a party by petitioner, Benjamin F. Kitchen, Jr., and more than ninety days have expired since the judgment of the Supreme Court of Louisiana has become executory, and opponent al-

leges she has been prejudiced thereby as part of the property of Lillie Weir Simms resulting from her being a forced heir and legatee of her mother, Bessie Simms Franzheim, who was a daughter and forced heir and legatee of the latter's mother, Lillie Weir Simms, under the complained of decision of the Supreme Court of Louisiana was given to her through the Succession of Bessie Simms Franzheim and petitioner's petition for writ of certiorari should either be denied for this reason and for other reasons, or she should be made a party respondent herein and the petition of petitioner, Benjamin F. Kitchen, Jr., should be denied.

Only petitioner, Benjamin F. Kitchen, Jr., out of a number of defendants in the original proceedings, who litigated by appeal and also by application for certiorari to the Supreme Court of Louisiana the decision of the District Court which was adverse to them, has elected to petition this Court. Mrs. Simms attempted to establish two trusts by her will and also appointed executors in said will. None of the trustees of the two trusts which Mrs. Simms attempted to establish, none of the executors of Mrs. Simms' will, and none of the great-grandchildren of Mrs. Simms (with the exception of that filed by petitioner, Benjamin F. Kitchen, Jr., as tutor of his son, Benjamin F. Kitchen, III, a great-grandchild of Mrs. Simms) have filed with this Court a petition for writ of certiorari to the Supreme Court of Louisiana.

B. Both in the inter vivos trust to which Mrs. Simms made reference in her will and also in the will

itself there was language which established beyond the peradventure of a doubt that the testatrix, Lillie Weir Simms, definitely had in mind the law of the State of Louisiana rather than the law of the State of Texas. We quote from the will of Mrs. Simms dated January 3, 1957, as follows:

> (1) "My daughter, Mrs. Bessie Franzheim, under the laws of the State of Louisiana, is entitled to one-third of all the real estate and royalties owned by me in the said State of Louisiana, and it is my desire that she should receive this one-third." (Article XVII, will of Mrs. Simms as annexed to Petition for Probate at R. 12.)
>
> (2) Each of the inter vivos trusts referred to in the will and to which reference is made for the rights, powers and duties of the trustees and, in connection with the trusts for the great-grandchildren, for the purpose of identifying trustees and trust properties, provides in paragraph 17 thereof that ". . . this instrument shall be construed in all respects according to the laws of the State of Louisiana". (Exhibits A, B and C(1) through C(6) annexed to the stipulation of April 24, 1963, R. 192 et seq.)

C. The petition for certiorari states, at page 22, that ". . . nowhere in the will do either of the life tenants, the grandchildren, acting through Trustees or otherwise, have any right to sell, mortgage or commit waste of the principal properties from which the income was expected to be derived . . .". Each

of the inter vivos trust agreements above referred to provides in paragraph 6 thereof that the trustees have the power to lease the trust property beyond the period of the trust, may borrow money on the credit of the trust estate, may mortgage the trust properties and may pledge the trust assets."

D. The Louisiana Supreme Court's decree dated November 7, 1966, is clearly based upon the finding that Article XIX of her will, which forms the basis for this litigation, was null and void because it contains a *prohibited substitution.* The decree was further based upon the determination of the Supreme Court of Louisiana upon an additional independent non-federal ground that many of the conditions under which the grandchildren and great-grandchildren are to succeed to the interest bequeathed them in the will are contained in the inter vivos trusts established by Mrs. Simms in 1954 and which inter vivos trusts Mrs. Simms made a part of her will by reference only, although they were intended to affect and relate to the disposition mortis causa of her property. We quote the following excerpt from the final decision of the Supreme Court of Louisiana, starting at page 75, in Appendix C, annexed to the petition for writ of certiorari, as follows:

> "In the first place, it is apt to observe here that many of the conditions under which the grandchildren and great-grandchildren are to succeed to the interests bequeathed them in the will are contained in the inter vivos trusts established by Mrs. Simms in 1954, and which she

makes a part of her will by reference only, although they are intended to affect and relate to the disposition mortis causa of the property. Under the jurisprudence of this state *this invalidated the entire will.* Succession of Ledet, 170 La. 449, 128 So. 273 and Hessmer v. Edenborn, 196 La. 575, 100 So. 647. As stated in the latter case, with the late Justice Odom as the organ of the court: '. . . *where a testator refers to another writing for the purpose of manifesting the substance of his wish or desire, and where that wish cannot be ascertained without referring to such writing, then the testament . . . is invalid.*' (The emphasis has been supplied by respondent.)

"We are not unmindful of the fact that under the provisions of Articles 10, 491, and 1596 of the Revised Civil Code testaments are effective in this state where, as stated in the latter article, they are 'clothed with all the formalities prescribed for the validity of wills' where they were executed. But these articles have reference to matters of form that neither affect nor relate to the disposition of the property. In any event, and without resort to the documents which Mrs. Simms sought to incorporate in her will by reference alone, it is clear that Article XIX in itself contains a prohibited substitution pure and simple."

E. Under Item 2 of the captioned "Jurisdiction" petitioner refers to raising the federal question in the brief of petitioner in the Court of Appeals and also in

the opinion on rehearing of the Louisiana Supreme Court. The constitutional complaint of the petitioner, as reflected in the references to the Louisiana Supreme Court opinion, was based upon the action of that Court in declaring the trust provisions invalid by applying the law of Louisiana. This contention was found to have no merit by the Supreme Court of Louisiana. Petitioner in his brief in the Court of Appeal at page 17, under the caption IV, set forth his contention that "the court's determination that Louisiana law applied, instead of that of Texas, under which the will is valid, is inequitable and is tantamount to a denial of the federal guaranteed rights of equal protection, U. S. Const. amend. XIV, Sec. 1, privileges and immunities, U. S. Const. art. IV., Sec. 2."

In the petition for writ of certiorari filed with this Court and directed to the Supreme Court of Louisiana the petitioner assigned as an error, alternatively with respect to the decision of the Court of Appeal for the Fourth Circuit, State of Louisiana, that the application by the Supreme Court of Louisiana of the Louisiana law to this case by nullifying the will of Mrs. Simms abridged rights of petitioner which were guaranteed by the Constitution of the United States of America, complaining that that court's finding that the law of Louisiana applied instead of the law of Texas was inequitable and denied federal guaranteed rights. Petitioner took the same position in his original brief filed in the Supreme Court of Louisiana. *Petitioner did not urge the contention now made in this Court* to the effect that while the law of

Louisiana is applicable, resort to the common law or the law of Texas should be made or had for the purpose of ascertaining the intention of decedent in her will and that the failure to do so resulted in a denial to petitioner of his constitutional rights until petitioner filed his brief in the Supreme Court of Louisiana supporting his application for a rehearing of that court's decision.

STATEMENT OF OPPOSITION.

The application of the Texas law in this case is not involved, but the Louisiana law is controlling. The question involved is what validity and legal effect is to be given to the will of a person domiciled in Texas on the date of her death insofar as it relates to property located in Louisiana which is classified by Louisiana law as an immovable, which is the same as real property under the nomenclature of the law of common law states. Immovable property under the law of Louisiana is in the same category as land. It is an old established rule that the law of each state controls the descent and distribution of immovable or real property within its borders. In this case the Louisiana law governs the alienation, transfer and descent of the immovable property referred to in Article XIX of the will of the decedent. The effect and construction of wills and other conveyances are governed by the law of the state where the immovable or real property is located. *Olmsted vs. Olmsted,* 216 U.S. 386, 54 L.Ed. 530, 30 S.Ct. 292; *Hood vs. McGehee,* 237 U.S. 611, 59 L.Ed. 1144, 35 S.Ct. 718. Although

petitioner concedes that the Louisiana law should be applied, it is his contention that if the law of Louisiana is applied this will deny him constitutional rights which the Supreme Court of Louisiana decided lacked merit. Petitioner has sought to escape the application of the old established law, which we have cited above, by contending that the Supreme Court of Louisiana deprived him of vested constitutional rights by failing to apply the same standards in interpreting the will of decedent as it would have used if decedent were a resident of Louisiana and, second, that the Supreme Court of Louisiana, even though the matter involved immovable or real property in Louisiana, should have construed the will of decedent in accordance with the common law and not in accordance with the law of Louisiana. There is a clear lack of a substantial federal question in this matter. There was also a failure on the part of petitioner in raising the specific constitutional question which petitioner now presents except in petitioner's brief in support of an application for rehearing. The constitutional question passed upon is not that referred to in petitioner's statement as to jurisdiction on page 2 of petitioner's brief.

Petitioner, so far as we can find in his application for a writ of certiorari, has cited no authority to uphold petitioner's contention that the interpretation by the Supreme Court of the State involving the validity of a will, insofar as it affects immovable real property within that state, according to the laws of that state, provides a basis for the denial of

any federal right for the using of the discretion of this Court in granting writs of certiorari. Petitioner, likewise, has not cited any decision which shows that the Supreme Court of Louisiana has made any distinction between the interpretation of wills of residents of Louisiana and non-residents of Louisiana. Petitioner has not cited any authority which shows that the Supreme Court of Louisiana has discriminated in any manner in deciding the validity of a non-resident's will. All that petitioner seems to be trying to do is to substitute the law of the State of Texas for the law of the State of Louisiana so that he can persuade this Court to grant a writ of certiorari.

From *Olmsted vs. Olmsted, supra,* 216 U.S. at p. 395, 54 L.Ed. at p. 533, and 30 S.Ct. at p. 295, we quote the following:

> "We are not concerned with the correctness of the decision of the court of appeals of New York, interpreting its statutes and applying the law of its jurisdiction to the construction of the will of Silas Olmsted. We hold that there is nothing in the Federal Constitution requiring the courts of the state of New York to give force and effect to the statute of the state of Michigan, so as to control the devolution of title to lands in New York."

Petitioner contends that the decedent's intention should be determined by construing the language of the will according to the law of Texas. This would be an exception to the rule rather than the rule which we should apply here. The decedent clearly had in

mind the law of the State of Louisiana if we refer to the will. In Paragraph XVII the decedent refers to the laws of Louisiana as follows:

> "My daughter, Mrs. Bessie Franzheim, under the laws of the State of Louisiana, is entitled to one-third of all the real estate and royalties owned by me in the said State of Louisiana, and it is my desire that she should receive this one-third."

Since Mrs. Bessie Franzheim was the only child of Mrs. Simms, she was entitled as forced heir to receive under the Louisiana law a legitime of one-third and Mrs. Simms shows in said provision of the will that she clearly had the law of Louisiana in mind in regard to her real estate and royalties owned by her in the State of Louisiana. The decedent in setting up inter vivos trusts prior to her death clearly did away with the presumption that as a domiciliary of Texas she intended the will to be construed under its law not only by reference to the aforesaid provision of her will but also by references in the will to the inter vivos trusts which she had set up prior to her death. She refers to these inter vivos trusts in Paragraph XIX of her will in subparagraph (a) where she refers to the trust agreement made in the inter vivos trusts. In this inter vivos trust agreement which is referred to in the will it is provided that the trusts attempted to be created by the will are "to be held and administered by them, the income of which shall be invested or distributed at the sole discretion of said Trustees and shall be held by said Trustees and their suc-

cessors with the same rights, powers and duties as are set forth in the above named trust agreement."

It is provided in the inter vivos trust ". . . this instrument shall be construed in all respects according to the laws of the State of Louisiana." (Exhibits A, B and C(1) through C(6) annexed to the stipulation of April 24, 1963, R. 192 et seq.)

A reading of the petition of petitioner shows that he conceded that the effect of the bequest must be determined by the law of Louisiana. It is this legal effect of the language which the Supreme Court of Louisiana has determined invalidated the will, that is, the language of the will did not, according to the law of Louisiana, leave a usufruct of property to one and the naked ownership to another, which is the test used by the Supreme Court under the Louisiana law to determine the validity of the will.

Petitioner tries to allege discrimination in the manner used by the Supreme Court of Louisiana in determining whether or not there was a prohibited substitution and petitioner refers at page 14 of his petition to *Succession of Fertel*, 208 La. 614, 23 So.2d 234 (1945). In that case petitioner states that the husband's usufruct and his son's legitime were recognized under the terms of a will which ". . .left the property to the husband, after death to the son." In a Per Curiam, 23 So.2d at p, 245, we find a statement of the manner in which the Louisiana courts determine whether provisions of a will violate Article 1520 of the Louisiana Civil Code or are permitted by Article

1522 of the Louisiana Civil Code. This excerpt from said case shows clearly that the disputed will did not leave the property to the husband of the decedent and after his death to the son. In the *Fertel* case decedent left "the use of" the property to her husband while in the *Simms* case decedent left title to the property to the trustees and after the termination of the trust bequeathed the property to great-grandchildren who were not beneficiaries of the trust. From the *Succession of Fertel* case we quote, at p. 245:

> "Barney Fertel is the only party who has applied for a rehearing. His contention is that the will is null in that it violates article 1520 of the Civil Code. The article provides that a testamentary disposition by which the legatee is charged with the duty to preserve the legacy for a third person, to whom the title is to pass at the death of the legatee is a prohibited substitution. According to article 1522 a bequest of the usufruct of property to one person and of the naked ownership to another is not a prohibited substitution and is therefore a valid disposition of both the usufruct and the ownership of the property. In deciding, in any given case, whether a legacy of this kind is violative of article 1520 of the Code, the only question is whether the intention of the testator as expressed in his will was to give the usufruct of the property to one person and the ownership to another, as permitted by article 1522 of the Civil Code. Each case is governed by the wording of the testament. The deci-

> sions on the subject are reviewed extensively, and compared in the Succession of Ledbetter, 147 La. 771, 85 So. 908. There is no necessity for reviewing or comparing the decisions again in this case, Here, the testatrix did not declare that she left her property to her husband, but declared that she left 'the use of it' to her husband, and that at his death it should go to her two daughters and her grandson. By the term 'the use of it' the testatrix must have meant the usufruct of the property, not the ownership of it."

It can clearly be seen that the decedent in the *Succession of Fertel* left to her husband the use of the property while in the *Simms* case the bequest to the trustees was not the use of the property, but the property.

Another case which involved the will of a Louisiana decedent was the *Succession of Ledbetter*, 147 La. 771, 85 So. 908, where the Supreme Court of Louisiana declared the will of a Louisiana decedent invalid because it violated Article 1520 of the Louisiana Civil Code and which is a clear example of the application of the same rule to the will of a Louisiana decedent as in the present case of a Texas resident decedent.

We quote from the *Succession of Ledbetter*, at p. 773 referring to the will as follows:

> " 'Second. After complying with the above provisions, I wish my son, Dr. Wiltz M. Ledbetter,

to have the half of remaining part of my estate or the half of the revenues therefrom during his lifetime. But should he die without an heir or child I wish his part of my estate to be paid or go to my present grandchildren, viz.: Wiltz M. Ledbetter, William V. Ledbetter and Joanna Ledbetter (children of Dr. Marion Ledbetter) and equally with these any other grandchildren that may yet be born.' "

We again quote from the *Succession of Ledbetter*, at p. 779 where the Louisiana Supreme Court said:

" 'The bequest in this case is as plain a substitution as can be conceived. According to article 1520 of the Code, it is absolutely null. To declare it valid, under the doctrine that the giving of property to one person during his life and at his death to another is the giving of a life usufruct to one and the naked ownership of the property to the other legatee would be an absolute violation of article 1520 of the Code.

" 'Being therefore compelled now to elect whether to correct or perpetuate the error of the doctrine announced in Rice v. Key and repeated in the Succession of McDuffie, we now correct the error, and overrule those decisions in so far as they hold that the giving of property to one person during his life and at his death to another is the giving of the usufruct to one and the naked ownership of the property to the other legatee.' "

The test of whether a substitution prohibited by our law is contained in a will is that it vests the property in one person at the death of the testator and upon the death of that person, in whom it was vested at the death of the testator, the same property is vested in another person who takes the property directly from the testator but by a title which only springs into existence on the death of the first donee. By making this disposition in the will the testator destroys the power of the first donee to alienate the property, because the first donee is bound to hold the property until his death so that the person then called to the title upon the death of the first donee may take same. The second donee during the life of the first donee has no power of alienation because his title does not spring into existence until the death of the first donee. This is a substitution and is reprobated under the law of the State of Louisiana.

Petitioner has referred to certain decisions of the Louisiana Supreme Court (see Appendix C, page 68, of the petition herein). With the exception of the *Guillory* and *Meadors* cases, the Louisiana Supreme Court discussed substitutions involved in wills of Louisiana residents. It therefore clearly appears that not only did petitioner not become vested with any property interest under Louisiana law but that he was not discriminated against by the Louisiana Supreme Court in its application of the Louisiana law. We quoted from the decision of the Louisiana Supreme Court, at page 4 *supra*, which is sought here to be reviewed, and which quotation shows that it was

based on a substantial and sufficient non-federal ground. If it appears that the decision in a state court judgment rests on an independent, non-federal ground, which is adequately supported, this Court has established a principle of not reviewing that state court judgment. See Comment and Authorities, Sec. 158, page 337 et seq. of West's Federal Forms, Vol. 1.

SUMMARY AND CONCLUSION.

It therefore is quite clear that the petition does not have any basis upon which this Court should grant a writ of certiorari. This case involves the validity of a will relating to immovable or real property within the State of Louisiana. The law of Louisiana and the interpretation thereof by the Louisiana Supreme Court is therefore controlling. Petitioner has conceded that the effect is to be determined by the law of Louisiana, and petitioner's suggestion that the Texas law should be applied in interpreting the will in this case cannot be applied to the circumstances of this case. Here Mrs. Simms, the decedent, contemplated the application of the law of Louisiana both in her will and in the reference thereto in the inter vivos trusts. The legal effect of what Mrs. Simms has done must be determined by the law of Louisiana where the immovable and real property is located. This case lacks any substantial federal question, and petitioner has not heretofore raised the specific constitutional issues which petitioner now urges. Further, the Louisiana Supreme Court decided that decedent's will could not under the law of Louisiana incorporate ex-

trinsic, non-testamentary trust instruments, and that this likewise invalidated the will. This alone provides a substantial and sufficient non-federal ground as to which no issue has been taken by the petitioner.

For all of the above and foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

.....
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New Orleans, Louisiana 70112,

.....
E. HAROLD SAER, JR.,
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New Orleans, Louisiana 70112,
Attorneys for Lillie Weir Franzheim McCullar, Respondent.

PROOF OF SERVICE.

I, John L. Toler, attorney for respondent, Lillie Weir Franzheim McCullar, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this day I served copies of the foregoing Brief of Respondent on Petition for Writ of Certiorari on:

H. Alva Brumfield and
Sylvia Roberts,
509 St. Louis Street
Baton Rouge, Louisiana

and

Decatur J. Holcombe.
809 First City National Bank Bldg.
Houston, Texas

Counsel for Petitioner for Writ of Certiorari, and also on:

Morris Wright
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Sidney Wright
512 First City National Bank Bldg.
Houston, Texas

and

Cobb & Wright
Joseph V. Ferguson II
902 Whitney Bank Bldg.
New Orleans, Louisiana
Counsel for Elizabeth Franzheim Reese, Respondent,

by mailing a copy thereof, postage prepaid, addressed to their offices as above shown and at the addresses above shown.

New Orleans, Louisiana, this .... day of September, 1967.

.....
JOHN L. TOLER.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 169

BENJAMIN F. KITCHEN, JR.,
Petitioner,

versus

ELIZABETH FRANZHEIM REESE.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR REHEARING

PETITIONER presents his petition for a rehearing of this Court's Order dated October 9, 1967, denying the Petition for Writ of Certiorari to the Supreme Court of Louisiana, and in support thereof with respect shows:

GROUNDS FOR REHEARING

The constitutional question raised in this case relates to the action of the Louisiana courts in destroying vested prop-

erty rights and thereby violating protection afforded by the United States Constitution.

On the same date of this Court's Order mentioned above, October 9, 1967, an article appeared in the Tulane Law Review which discussed in great detail the decision of the Supreme Court of Louisiana in the case at bar entitled "Succession of Simms—The [Civil] Law is a Jealous Mistress," 41 Tulane Law Review 885 (1967). The author is highly critical of the decision in the findings of the Supreme Court of Louisiana. The importance of this article is an intervening circumstance of such significance that the Petitioner urges that the problems be re-examined.

The premises on which this application is based are incontrovertible:

(1) Petitioner's son was vested with an estate valued at approximately $500,000,[1] being a vested remainder in a portion of Louisiana properties appraised at $5,876,155.

(2) Petitioner's son was divested of this estate by the Supreme Court of Louisiana through its interpretation of Louisiana law.

(3) Vested rights, such as were transmitted to Petitioner's son, are protected by the United States Constitution. The Supreme Court of Louisiana has invalidated the will of Mrs. Lillie Weir Simms by holding that the vested interest was a "prohibited substitution," thus meeting head-on a conflict with the federal constitution.

---

[1] See "Succession of Simms—The [Civil] Law is a Jealous Mistress," Id. at page 886, Footnote 9.

(4) Importance of the decision:

(A) Universally (other than in Louisiana) and traditionally accepted trust devices cannot be used to transfer ownership in Louisiana royalty interests.[2] Such interests are owned by persons in all of the United States, and indeed throughout the world; they are freely assignable in small fractional interests, yet future testamentary trusts cannot convey ownership to the beneficiaries. The magnitude of the problem is apparent when one considers that attorneys in 49 of the 50 states almost daily prepare wills containing trust provisions and that Louisiana royalty interests comprise some portion of countless thousands of estates. Louisiana happens to be the second largest oil producing state and had a total production in the fiscal year 1966-1967 of more than 505 million barrels of oil alone, which, at a market price of $3.00 per barrel, would amount to more than one and one-half billion dollars.

(B) The Louisiana Trust Code enacted in 1964 does not limit future application of the *Simms* decision. Knowledgeable Louisiana attorneys are convinced that such Code still does not permit a "prohibited substitution." A pertinent analysis, for example, was made in the Louisiana Bar Journal, Vol. XXIII, No. 2, 131, at page 137 (August 1965) by Mr. Thomas B. Lemann, a member of the Trust Advisory Committee, as follows:

> "I should caution you that with all these wonderful things that the new Trust Code does

[2] For example, to A in trust, with income to B for life, remainder to C.

> for you, there are some things it does not do for you and you should not, for example, think that you can set up a classical substitution as long as you put it in a trust. You still cannot have a substitution, involving a bequest to A and then at his death to B, in or out of trust. * * *"

(C) The *Simms* decision could create an onslaught of litigation by statutory heirs in Louisiana on contentions that wills of their ancestors were absolute nullities.[3]

Briefly, in response to reply briefs filed herein wherein some comment has been made that this Petitioner is the only party seeking Writ of Certiorari, we wish to point out, first, that only the great grandchildren of Mrs. Simms, of whom Petitioner is one, lose by the invalidity of the will; the rights of the other six great grandchildren, throughout this litigation, have been left to the protection of their mothers, each of whom qualified as tutrix and to undertutors. There is obvious conflict of interests between the parents, Mrs. Reese and Mrs. McCullar, and their respective wards.

Second, that only this Petitioner raised timely federal questions.

Plainly, the other parties have an advantage if the provisions of the will are struck down, in that they will receive their inheritance in full ownership as opposed to life estates burdened by discretionary rights in the trustees to make or not to make distributions from income. This is one of those rare cases in which certain proponents of a will stand to gain

[3] Id. at page 896, Footnote 66.

more by losing the case than by winning it. The attention of the Court is invited to the cited article, at pp. 886 and 887, which diagrams the relationships of the parties.

CONCLUSION

For the reasons set forth in this petition for rehearing, as well as the petition for certiorari previously filed, rehearing and certiorari should now be granted.

Respectfully submitted,

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By: _____
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PROOF OF SERVICE

I, Sylvia Roberts, attorney for petitioner, Dr. Benjamin F. Kitchen, Jr., Tutor of the minor, Benjamin F. Kitchen, III, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing Petition for Rehearing on:

Morris Wright, Esquire
Cobb and Wright
Whitney Building
New Orleans, Louisiana

Sidney Wright, Esquire
Texas National Bank Building
Houston, Texas

counsel for respondents, by mailing a copy thereof, postage prepaid, addressed to their offices as shown above.

Baton Rouge, Louisiana, this _____ day of October, 1967.

SYLVIA ROBERTS

CERTIFICATE OF COUNSEL

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in Paragraph 2 of Rule 58.

SYLVIA ROBERTS